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In The

Supreme Court of the United States

October Term, 1997

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

and

ROBERT C. HILLIARD and BARRY J. NACE,

vs. *Petitioners,*

MERRELL DOW PHARMACEUTICALS, INC.,

and

THE SUPREME COURT OF THE STATE OF TEXAS, consisting of CHIEF JUSTICE THOMAS PHILLIPS, and ASSOCIATE JUSTICES, GREG ABBOTT, JAMES BAKER, CRAIG ENOCH, RAUL GONZALEZ, DEBORAH HANKINSON, NATHAN HECHT, PRISCILLA OWENS, and ROSE SPECTOR,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Texas

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APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued on March 19, 1996

JUSTICE OWEN delivered the opinion of the Court in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HECHT, JUSTICE CORNYN, JUSTICE ENOCH, and JUSTICE ABBOTT join.

JUSTICE GONZALEZ filed a concurring opinion.

JUSTICE SPECTOR filed a concurring opinion.

JUSTICE BAKER not sitting.

The issue in this case is whether there is any evidence that the drug Bendectin caused Kelly Havner to be born with a birth defect. We hold that the evidence offered is legally insufficient to establish causation. Accordingly, we reverse the judgment of the court of appeals. 907 S.W.2d 535.

I

Kelly Havner was born with a limb reduction birth defect. The fingers on her right hand were not formed. Kelly's mother had taken the prescription drug Bendectin in 1981 during her pregnancy to relieve nausea and other symptoms associated with morning sickness. Bendectin was formulated by Merrell Dow and its predecessors and marketed in the United States from 1957 to 1983. It was sold in other countries as well, but was called Debendox in the British Commonwealth, Ireland, and Australia and Lenotan in West Germany. The Bendectin Marilyn Havner ingested had two components: doxylamine succinate, which is an antihistamine, and pyridoxine hydrochloride, which is vitamin B-6. Prior to 1977, Bendectin had contained a third component, dicylomine hydrochloride, which is an anticholergenic. Approximately thirty million women took Bendectin in either the two- or three-ingredient form.

More than twenty years ago, questions were raised about Bendectin and its possible association with birth defects. The FDA investigated the concerns, but failed to conclude that Bendectin increased the risk of birth defects. More than thirty studies on Bendectin and birth defects have been conducted and published in peer-reviewed scientific and medical journals since questions were first raised. None of these studies concludes that children of women who took Bendectin during pregnancy had an increased risk of limb reduction birth defects. Some of these studies affirmatively conclude that there is no association between Bendectin and birth defects and that Bendectin is a safe drug. Although FDA approval of

Bendectin has never been revoked, Merrell Dow withdrew the drug from the market in 1983, a little over a year after Kelly Havner was born.

The Havners' suit is based on theories of negligence, defective design, and defective marketing. It is one of thousands brought against Merrell Dow and its predecessors for the manufacture and distribution of Bendectin. In virtually all the Bendectin litigation, the central issue has been the scientific reliability of the expert testimony offered to establish causation. Merrell Dow challenged the Havners' causation evidence at several junctures in these proceedings. It filed a motion for summary judgment, contending that there is no scientifically reliable evidence that Bendectin causes limb reduction birth defects or that it caused Kelly Havner's birth defect. Before denying the motion, the trial court held a hearing at which the scientific reliability of the Havners' summary judgment evidence was extensively aired.

Just before trial, the scientific reliability of the Havners' evidence was again raised by Merrell Dow in motions in limine that sought to exclude the testimony of certain of the Havners' experts and other causation evidence. Once of these motions requested that testimony about causation be excluded until a prima facie case had been established that there was a statistically significant elevated risk that a child would be born with limb reduction birth defects if the child's mother ingested Bendectin. Another motion sought to preclude the Havners' witnesses from relying on *in vitro* and *in vivo* animal studies. Other motions sought to exclude entirely the testimony of three of the Havners' causation witnesses.

The issues were fully briefed, and after a lengthy hearing, the trial court denied each of the motions.

A bifurcated jury trial ensued. In the liability phase, the Havners called five experts on the causation question. Merrell Dow objected to the admission of some, but not all, of this evidence. Merrell Dow also unsuccessfully moved for a directed verdict on the issues of causation at the close of the Havners' evidence. As can be seen from the record the question of scientific liability was raised repeatedly.

At the conclusion of the liability phase, the jury found in favor of the Havners and awarded $3.75 million. In the punitive damages stage, the jury awarded $30 million, but that amount was reduced by the trial court to $15 million pursuant to former TEX. CIV. PRAC. & REM. CODE § 41.007. Merrell Dow appealed.

The panel of the court of appeals that originally heard the case reversed and rendered judgment that the Havners take nothing, holding that the evidence of causation was legally insufficient. 907 S.W.2d at 548. The panel concluded that "[t]he Havners have failed to bring forward anything more than suspicion on the essential element of causation." *Id.* On rehearing en banc, a divided court disagreed. It affirmed the trial court's award of actual damages, but reversed and rendered the award of punitive damages. *Id.* at 564. We granted Merrell Dow's application for writ of error.

Merrell Dow challenges the legal sufficiency of the Havners' causation evidence and the admissibility of some of that evidence and further contends that its due process rights under the United States Constitution and its due course rights under the Texas Constitution were

denied. Because of our disposition of this case, we reach only the no evidence point of error.

II

All the expert witnesses on causation have appeared in other cases in which Bendectin was claimed to have caused limb reduction birth defects. The Sixth Circuit commented that the Bendectin suits are "variations on a theme, somewhat like an orchestra which travels to different music halls, substituting musicians from time to time but playing essentially the same repertoire." *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1351 (6th Cir. 1992).

The federal courts have dealt extensively with Bendectin litigation. To date, no plaintiff has ultimately prevailed in federal court. The evidence in those cases has been similar to that offered by the Havners. The federal decisions have discussed the substance of the evidence in detail, and often the testimony under scrutiny included that of Drs. Palmer, Newman, Glasser, Gross, and Swan, the Havners' witnesses. These decisions are not binding on our Court, but they do provide extensive consideration of the scientific reliability of the causation evidence.

Some federal courts have concluded that the expert evidence of causation is legally insufficient. *See Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068 (6th Cir. 1993); *Turpin*, 959 F.2d 1349; *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307 (5th Cir.), *modified on reh'g*, 884 F.2d 166 (5th Cir. 1989); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988); *LeBlanc v. Merrell Dow Pharms., Inc.*, 932 F. Supp. 782 (E.D. La. 1996); *Hull v. Merrell Dow Pharms.*,

Inc., 700 F. Supp. 28 (S.D. Fla. 1988); *Monahan v. Merrell-National Labs.*, No. 83-3108-WD, 1987 WL 90269 (D. Mass. Dec. 18, 1987).

Other federal courts have found the expert evidence to be inadmissible. *See Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371 (D.C. Cir. 1997); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir.) (on remand), *cert. denied*, 116 S. Ct. 189 (1995); *Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir. 1990); *Lynch v. Merrell-National Labs.*, 830 F.2d 1190 (1st Cir. 1987); *DeLuca v. Merrell Dow Pharms., Inc.*, 791 F. Supp. 1042 (D.N.J. 1992), *aff'd*, 6 F.3d 778 (3d Cir. 1993); *Lee v. Richardson-Merrell, Inc.*, 772 F. Supp. 1027 (W.D. Tenn. 1991), *aff'd*, 961 F.2d 1577 (6th Cir. 1992); *Cadarian v. Merrell Dow Pharms., Inc.*, 745 F. Supp. 409 (E.D. Mich. 1989); *Ambrosini v. Richardson-Merrell, Inc.*, No. 86-278, 1989 WL 298429 (D.D.C. June 30, 1989), *aff'd*, 946 F.2d 1563 (D.C. Cir. 1991); *Will v. Richardson-Merrell, Inc.*, 647 F. Supp. 544 (S.D. Ga. 1986).

One federal circuit court initially found the expert testimony admissible and reversed a summary judgment for Merrell Dow. *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 952-59 (3d Cir. 1990). However, on remand the trial court once again found the evidence inadmissible and, after entering extensive findings of fact and conclusions of law, granted summary judgment for Merrell Dow. The Third Circuit affirmed that judgment with an unpublished opinion. *DeLuca v. Merrell Dow Pharms., Inc.*, 791 F. Supp. 1042 (D.N.J. 1992), *aff'd*, 6 F.3d 778 (3d Cir. 1993).

A few federal district courts have denied summary judgment for Merrell Dow on the basis that the evidence

raised a fact question. *Longmore v. Merrell Dow Pharms., Inc.*, 737 F. Supp. 1117 (D. Idaho 1990); *In re Bendectin Prods. Liab. Litig.*, 732 F. Supp. 744 (E.D. Mich. 1990); *Hagen v. Richardson-Merrell, Inc.*, 697 F. Supp. 334 (N.D. Ill. 1988); *see also Lanzilotti v. Merrell Dow Pharms., Inc.*, No. 82-0183, 1986 WL 7832 (E.D. Pa. July 10, 1986) (denying motion for directed verdict).

Decisions in which Merrell Dow obtained a jury verdict in its favor include *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149 (10th Cir. 1990), and *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988).

However, a state trial court recently entered judgment on a jury verdict against Merrell Dow that included a finding of fraud. In a written opinion, the court was highly critical of the evidence offered by Merrell Dow, concluding that there was ample evidence Merrell Dow had made misrepresentations to the FDA, including misrepresentations about its animal studies on Bendectin. *Blum v. Merrell Dow Pharm., Inc.*, No. 1027 (Pa. Ct. C.P. Dec. 13, 1996) (appeal pending).

At least one state court has granted summary disposition for Merrell Dow on the basis that the expert testimony of Drs. Newman, Palmer, and Swan was inadmissible. *Depyper v. Navarro*, No. 83-303467-NM, 1995 WL 788828 (Mich. Cir. Ct. Nov. 27, 1995) (holding plaintiffs' experts' testimony inadmissible under the *Davis/Frye* rule and rendering judgment for Merrell Dow).

The only appellate decision we have found, state or federal, that has upheld a verdict in favor of a plaintiff in a Bendectin case is from the court of appeals for the

District of Columbia in *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C. 1986) (reversing judgment notwithstanding the verdict and remanding for reinstatement of compensatory damages and determination of punitive damages). However, the subsequent history of that case is somewhat extraordinary. Upon remand to the trial court, instead of following the court of appeals' directive, the trial court granted Merrell Dow's motion for new trial and vacated the judgment. Another appeal ensued, and the case was remanded with instructions that a judgment be entered on the verdict. *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 563 A.2d 330, 331, 338 (D.C. 1989). Judgment was entered. Yet another appeal was taken, but the appeal was dismissed for lack of finality because the question of punitive damages remained to be tried. *Merrell Dow Pharms., Inc. v. Oxendine*, 593 A.2d 1023 (D.C. 1991). Following remand, judgment was entered, but Merrell Dow sought relief from the judgment in light of post-trial developments including epidemiological studies that were not completed at the time of trial. Merrell Dow also relied on appellate decisions decided on the heels of the first appellate decision in *Oxendine* that had concluded that there was no scientifically reliable evidence of causation in the Bendectin cases. The trial court declined to set aside the judgment. *Merrell Dow Pharms., Inc. v. Oxendine*, 649 A.2d 825, 827 (D.C. 1994). The fourth appeal ensued, and the appellate court remanded the case to the trial court for a determination of whether Merrell Dow could demonstrate "that the newly discovered evidence 'would probably produce a different verdict if a new trial were

granted.' " *Id.* at 832. On remand, the trial court extensively reviewed the evidence, including the testimony or affidavits of Drs. Newman, Swan, Palmer, Gross, and Glasser, and granted relief from the verdict, rendering judgment for Merrell Dow. *Oxendine v. Merrell Dow Pharms., Inc.*, No. 82-1245, 1996 WL 680992 (D.C. Super. Ct. Oct. 24, 1996) (appeal pending).

Thus, we are not the first court to wrestle with the issues presented by the Bendectin litigation.

III

As in most of the Bendectin cases, the central issue before us is not whether the plaintiffs' witnesses possessed adequate credentials, skills, or experience to testify about causation. The only witness whose qualifications have been challenged is Dr. Palmer, whose experience in identifying the cause of birth defects is questioned by Merrell Dow. *Cf. United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30-31 (Tex. 1997); *Broders v. Heise*, 924 S.W.2d 148, 151-54 (Tex. 1996). Indeed, the Havners' causation witnesses, including Dr. Palmer, testified in a case that reached the United States Supreme Court, and that Court deemed their credentials "impressive." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 583 & n.2 (1993). The issue before us, as in most of the previously cited Bendectin cases, is whether the Havners' evidence is scientifically reliable and thus some evidence to support the judgment in their favor.

In determining whether there is no evidence of probative force to support a jury's finding, all the record evidence must be considered in the light most favorable

to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party's favor. *Harbin v. Seale*, 461 S.W.2d 591, 592 (Tex. 1970). A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, " 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.' " *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995) (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994)).

Several of the Havners' experts testified that Bendectin can cause limb reduction birth defects. Dr. Palmer testified that, to a reasonable degree of medical certainty, Kelly Havner's birth defect was caused by the Bendectin her mother ingested during pregnancy. We have held, however, that an expert's bare opinion will not suffice. *See Burroughs Wellcome*, 907 S.W.2d at 499-500; *Schaefer v. Texas Employers' Ins. Ass'n*, 612 S.W.2d 199, 202-04 (Tex. 1980). The substance of the testimony must be considered. *Burroughs Wellcome*, 907 S.W.2d at 499-500; *Schaefer*, 612 S.W.2d at 202.

In *Schaefer*, a workers' compensation case, the plaintiff suffered from atypical tuberculosis, some strains of

which were carried by fowl. An expert testified that based on reasonable medical probability, the plaintiff's disease resulted from his employment as a plumber in which he was exposed to soil contaminated with the feces of birds. *Schaefer,* 612 S.W.2d at 202. Nevertheless, this Court looked at the testimony in its entirety, noting that to accept the expert's opinion as some evidence "simply because he used the magic words" would effectively remove the jurisdiction of the appellate courts to determine the legal sufficiency of the evidence in any case requiring expert testimony. *Id.* at 202-05. After considering the record in *Schaefer,* this Court held that there was no evidence of causation because despite the "magic language" used, the expert testimony was not based on reasonable medical probability but instead relied on possibility, speculation, and surmise. *Id.* at 204-05.

Other courts have likewise recognized that it is not so simply because "an expert says it is so." *Viterbo v. Dow Chem. Co.,* 826 F.2d 420, 421 (5th Cir. 1987). When the expert "br[ings] to court little more than his credentials and a subjective opinion," this is not evidence that would support a judgment. *Id.* at 421-22. The Fifth Circuit in *Viterbo* affirmed a summary judgment and the exclusion of expert testimony that was unreliable, holding that "[i]f an opinion is fundamentally unsupported, then it offers no expert assistance to the jury." *Id.* at 422; *see also Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 319 (7th Cir.) ("[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."), *cert. denied,* 117 S. Ct. 73 (1996); *Turpin v. Merrell Dow Pharms., Inc.,* 959 F.2d 1349, 1360 (6th Cir. 1992) (holding evidence legally

insufficient in Bendectin case when no understandable scientific basis was stated).

It could be argued that looking beyond the testimony to determine the reliability of scientific evidence is incompatible with our no evidence standard of review. If a reviewing court is to consider the evidence in the light most favorable to the verdict, the argument runs, a court should not look beyond the expert's testimony to determine if it is reliable. But such an argument is too simplistic. It reduces the no evidence standard of review to a meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence. We have rejected such an approach. *See Schaefer,* 612 S.W.2d at 205; *see also Burroughs Wellcome,* 907 S.W.2d at 499-500.

Justice Gonzalez, in writing for the Court, gave rather colorful examples of unreliable scientific evidence in *E.I. du Pont de Nemours & Co. v. Robinson,* 923 S.W.2d 549, 558 (Tex. 1995), when he said that even an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system. If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no. In concluding that this testimony is scientifically unreliable and therefore no evidence, however, a court necessarily looks beyond what the expert said. Reliability is determined by looking at numerous factors including those set forth in *Robinson* and *Daubert.* The testimony of an expert is generally *opinion* testimony. Whether it rises to the level of *evidence* is determined under our rules of evidence, including Rule

702, which requires courts to determine if the opinion testimony will assist the jury in deciding a fact issue.[1] While Rule 702 deals with the admissibility of evidence, it offers substantive guidelines in determining if the expert testimony is some evidence of probative value.

Similarly, to say that the expert's testimony is some evidence under our standard of review simply because the expert testified that the underlying technique or methodology supporting his or her opinion is generally accepted by the scientific community is putting the cart before the horse. As we said in *Robinson*, an expert's bald assurance of validity is not enough. 923 S.W.2d at 559 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir.) (on remand) (holding that expert's assertion of validity is not enough; there must be objective, independent validation of the expert's methodology), *cert. denied*, 116 S. Ct. 189 (1995)).

The view that courts should not look beyond an averment by the expert that the data underlying his or her opinion are the type of data on which experts reasonably rely has likewise been rejected by other courts. The underlying data should be independently evaluated in determining if the opinion itself is reliable. *See, e.g., In re*

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[1] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.

TEX. R. CIV. EVID. 702.

Paoli R.R. Yard PCB Litig., 35 F.3d 717, 747-48 (3d Cir. 1994); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir. 1988); *In re Agent Orange Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987). In the wake of the Supreme Court's decision in *Daubert*, the Third Circuit overruled its prior holding in *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 952 (3d Cir. 1990), that an expert's averment that his or her testimony is based on the type of data on which experts reasonably rely is generally enough to survive a Federal Rule of Evidence 703 inquiry. *In re Paoli*, 35 F.3d at 747-48. The Third Circuit was persuaded by Judge Weinstein's opinion in *In re Agent Orange:* " 'If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.' " *Id.* at 748 (quoting *In re Agent Orange*, 611 F. Supp. at 1245). If the expert's scientific testimony is not reliable, it is not evidence. The threshold determination of reliability does not run afoul of our no evidence standard of review.

Indeed, the United States Supreme Court would agree that a determination of scientific reliability is appropriate in reviewing the legal sufficiency of evidence. While admissibility rather than sufficiency was the focus of the Supreme Court's decision in *Daubert*, that Court explained that when "wholesale exclusion" is inappropriate and the evidence is admitted, a review of its sufficiency is not foreclosed:

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable

> juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . and likewise to grant summary judgment.

509 U.S. at 595.

The Court cited two Bendectin decisions in support of this statement, *Turpin*, 959 F.2d 1349, and *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir.), *modified on reh'g*, 884 F.2d 166 (5th Cir. 1989). In *Turpin*, the Sixth Circuit held that the scientific evidence, viewed in the light most favorable to the plaintiffs, was not sufficient to allow a jury to find that it was more probable than not that the defendant caused the injury. *Turpin*, 959 F.2d at 1350. In *Brock*, the Fifth Circuit reversed a judgment entered on a jury verdict because the evidence of causation was legally insufficient. *Brock*, 874 F.2d at 315; *see also Raynor v. Merrell Pharms. Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997) (affirming judgment notwithstanding the verdict and noting that even if expert testimony were admissible under *Daubert*, it was "unlikely" that a jury could reasonably find it sufficient to show causation).

As already discussed, a number of other decisions in the Bendectin litigation have held that the causation evidence was legally insufficient, sometimes setting aside a jury verdict and in other cases granting summary judgment or a directed verdict. *See supra* at ___. The decision in *Richardson* said in no uncertain terms that the trial court did not err in granting judgment notwithstanding the verdict because "[w]hether an expert's opinion has an adequate basis" is an issue "falling within the province of the court." 857 F.2d at 833.

There are many decisions outside the Bendectin litigation that have examined the reliability of scientific evidence in a review of the legal sufficiency of the evidence. *See, e.g., Conde v. Velsicol Chem. Corp.*, 24 F.3d 809, 813 (6th Cir. 1994) (stating that even if evidence is admissible under *Daubert*, it can still be legally insufficient to withstand summary judgment); *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Supp. 1441, 1485-86 (D.Vi.I) (granting summary judgment in toxic tort case when evidence of causation was insufficient to sustain a jury verdict), *aff'd*, 46 F.3d 1120 (3d Cir. 1994); *see also Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 39 (1st Cir. 1995) (noting that even if expert testimony about cause of plane crash were admitted, it would not be sufficient to permit a jury to find in plaintiffs' favor); *In re Paoli*, 35 F.3d at 750 n.21 ("[I]f the scintilla of evidence presented is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . [or] to grant summary judgment."); *cf. In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1131-37 (2d Cir. 1995) (finding evidence of causation in asbestos case legally sufficient and reversing trial court's judgment notwithstanding the verdict); *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 643 (7th Cir. 1995) (holding that trial court abdicated its responsibility by refusing to rule on admissibility and by instructing a verdict for the defendant in a blood bank case; assuming admissibility of the evidence, it would be legally sufficient). *But see Joiner v. General Elec. Co.*, 78 F.3d 524, 534 (11th Cir. 1996) (Birch, J., concurring) (stating that the sufficiency and weight of evidence are beyond the scope of a *Daubert* analysis), *cert. granted*, 117 S. Ct. 1243 (1997).

In *Robinson*, we set forth some of the factors that courts should consider in looking beyond the bare opinion of the expert. Those factors include:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses that have been made of the theory or technique.

See Robinson, 923 S.W.2d at 557. The issue in *Robinson* was admissibility of evidence, but as we have explained the same factors may be applied in a no evidence review of scientific evidence.

If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence.

We next consider some of the difficult issues surrounding proof of causation in a toxic tort case such as this.

IV

The Havners do not contend that all limb reduction birth defects are caused by Bendectin or that Bendectin always causes limb reduction birth defects even when taken at the critical time of limb development. Experts for the Havners and Merrell Dow agreed that some limb reduction defects are genetic. These experts also agreed that the cause of a large percentage of limb reduction birth defects is unknown. Given these undisputed facts, what must a plaintiff establish to raise a fact issue on whether Bendectin caused an individual's birth defect? The question of causation in cases like this one has engendered considerable debate. Courts that have addressed the issue have not always agreed, and commentators have expressed widely divergent views on the quantum and quality of evidence necessary to sustain a recovery.

Sometimes, causation in toxic tort cases is discussed in terms of general and specific causation. *See, e.g., Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 14 (1993). General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury. In some cases, controlled scientific experiments can be carried out

to determine if a substance is capable of causing a particular injury or condition, and there will be objective criteria by which it can be determined with reasonable certainty that a particular individual's injury was caused by exposure to a given substance. However, in many toxic tort cases, direct experimentation cannot be done, and there will be no reliable evidence of specific causation.

In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury. The finder of fact is asked to infer that because the risk is demonstrably greater in the general population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance. Such a theory concedes that science cannot tell us what caused a particular plaintiff's injury. It is based on a policy determination that when the incidence of a disease or injury is sufficiently elevated due to exposure to a substance, someone who was exposed to that substance and exhibits the disease or injury can raise a fact question on causation. *See generally Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320 n.13 (9th Cir.) (on remand), *cert. denied*, 116 S. Ct. 189 (1995). The Havners rely to a considerable extent on epidemiological studies for proof of general causation. Accordingly, we consider the use of epidemiological studies and the "more likely than not" burden of proof.

A

Epidemiological studies examine existing populations to attempt to determine if there is an association between a disease or condition and a factor suspected of causing that disease or condition. *See, e.g., Bert Black & David E. Lilienfeld, Epidemiologic Proof in Toxic Tort Litigation,* 52 FORDHAM L. REV. 732, 750 (1984). However, witnesses for the Havners and commentators in this area uniformly acknowledge that epidemiological studies cannot establish that a given individual contracted a disease or condition due to exposure to a particular drug or agent. *See, e.g.,* Michael Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-In-Fact,* 7 HARV. ENVTL. L. REV. 429, 431-35 (1983); Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence,* 96 YALE L.J. 376, 380 (1986). Dr. Glasser, a witness for the Havners, gave as an example a study designed to see if a given drug causes rashes. Even though a study may show that ten people who took the drug exhibited a rash, while rashes appeared on only three people who did not take the drug, Dr. Glasser explained that the study cannot tell us which of the exposed ten got the rash because of the drug. We know that things other than the drug cause rashes.

Recognizing that epidemiological studies cannot establish the actual cause of an individual's injury or condition, a difficult question for the courts is how a plaintiff faced with this conundrum can raise a fact issue on causation and meet the "more likely than not" burden of proof. Generally, more recent decisions have been willing to recognize that epidemiological studies showing an increased risk may support a recovery. Judge Weinstein,

whose decision in the Agent Orange litigation has been widely discussed and followed, has observed that courts have been divided between the "strong" and "weak" versions of the preponderance rule. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1261 (E.D.N.Y. 1985) (citing David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 857 (1984)). The "strong" version requires a plaintiff to offer both epidemiological evidence that the probability of causation exceeds fifty percent in the exposed population and "particularistic" proof that the substance harmed the individual. The "weak" version allows verdicts to be based solely on statistical evidence. Rosenberg, *supra*, 97 HARV. L. REV. at 857-58. Judge Weinstein concluded that the plaintiffs in *Agent Orange* were required to offer evidence that causation was "more than 50 percent probable," 611 F. Supp. at 1262, and that the plaintiffs' experts were required to "rule out the myriad other possible causes of the veterans' afflictions," *id.* at 1263.

Other courts have likewise found that the requirement of a more than 50% probability means that epidemiological evidence must show that the risk of an injury or condition in the exposed population was more than double the risk in the unexposed or control population. *See, e.g., Daubert*, 43 F.3d at 1320 (requiring Bendectin plaintiffs to show that mothers' ingestion of the drug more than doubled the likelihood of birth defects); *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 958 (3d Cir. 1990) (requiring that Bendectin plaintiffs establish relative risk of limb reduction defects arising from epidemiological

data of at least 2.0, which equates to more than a doubling of the risk); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1403 (D. Or. 1996) (requiring breast-implant plaintiffs to demonstrate that exposure to breast implants more than doubled the risk of their alleged injuries, which, in epidemiological terms, requires a relative risk of more than 2.0); *Manko v. United States*, 636 F. Supp. 1419, 1434 (W.D. Mo. 1986) (stating that a relative risk of 2.0 in an epidemiological study means that the disease more likely than not was caused by the event), *aff'd in relevant part*, 830 F.2d 831 (8th Cir. 1987); *Marder v. G.D. Searle & Co.*, 630 F. Supp. 1087, 1092 (D. Md. 1986) (stating that in IUD litigation, a showing of causation by a preponderance of the evidence, in epidemiological terms, requires a relative risk of at least 2.0), *aff'd*, 814 F.2d 655 (4th Cir. 1987); *Cook v. United States*, 545 F. Supp. 306, 308 (N.D. Cal. 1982) (stating that in vaccine case, when relative risk is greater than 2.0, there is a greater than 50% chance that the injury was caused by the vaccine).

Some courts have reached a contrary conclusion, holding that epidemiological evidence showing something less than a doubling of the risk may support a jury's finding of causation. In *In re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124, 1134 (2d Cir. 1995), the Second Circuit observed that the district court cited no authority for the "bold" assertion that standardized mortality ratios of 1.5 are statistically insignificant and cannot be relied upon by a jury. The circuit court held that it was far preferable to instruct the jury on statistical significance and to let the jury decide whether studies over the 1.0 mark have any significance. *Id.; see also Allen v. United States*, 588 F. Supp. 247, 418-19 (D.

Utah 1984) (explicitly rejecting the greater than 50% standard of causation in connection with statistical evidence), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987); *Grassis v. Johns-Manville Corp.*, 591 A.2d 671, 674-76 (N.J. Super. Ct. App. Div. 1991) (holding that trial court erred in precluding opinion testimony based on epidemiological studies showing relative risks of less than 2.0).

The "doubling of the risk" issue in toxic tort cases has provided fertile ground for the scholarly plow. Those who advocate that something short of a doubling of the risk is adequate to support liability or who advocate that some type of proportionate liability should be imposed include Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1237-51 (1987); Gold, *supra*, 96 YALE L.J. at 395-401; Khristine L. Hall & Ellen K. Silbergeld, *Reappraising Epidemiology: A Response to Mr. Dore*, 7 HARV. ENVTL. L. REV. 441, 445-46 (1983); Rosenberg, *supra*, 97 HARV. L. REV. at 859-60; *see also* 2 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 369-75 (1991) (discussing toxic tort cases and suggesting that proportionate compensation to all with the disease or disorder should be based on the attributable fractions of causation); D.H. Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Persuasion*, 73 CORNELL L. REV. 54, 71-73 (1987).

On the other end of the spectrum is Michael Dore, who asserts that epidemiological studies cannot, standing alone, establish causation. *See* Dore, *A Commentary on the Use of Epidemiological Evidence*, *supra*, 7 HARV. ENVTL. L. REV. at 434; *see also* Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U.L. REV. 643, 691 (1992) (concluding that in the absence

of other information, a doubling of the risk would be inadequate to support a plaintiff's verdict, but advocating that a lower risk might be sufficient if other risk factors could be eliminated); Melissa Moore Thompson, *Causal Inference in Epidemiology: Implications for Toxic Tort Litigation*, 71 N.C. L. REV. 247, 253, 289 (1992) (arguing that a strong association requires a risk ratio greater than or equal to 8.0, although moderate association of 3.0 to 8.0 could suffice if coupled with other factors).

Some commentators have been particularly critical of attempts by the courts to meld the more than 50% probability requirement with the relative risks found in epidemiological studies in determining if the studies were admissible or were some evidence that would support an award for the claimant. But there is disagreement on how epidemiological studies should be used. Some commentators contend that the more than 50% probability requirement is too stringent, while others argue that epidemiological studies have no relation to the legal requirement of "more likely than not." *Compare* Gold, *supra*, 96 YALE L.J. at 395-97 (advocating a relaxed threshold of proof), *with* Diana B. Petitti, *Reference Guide on Epidemiology*, 36 JURIMETRICS J. 159, 167-68 (1996) (finding no support in textbooks of epidemiology or from empirical studies for the proposition that when attributable risk exceeds 50% an agent is more likely than not to be the cause of the plaintiff's disease), *and* Thompson, *supra*, 71 N.C. L. REV. at 264-65 (asserting that the use of statistical association to satisfy a more likely than not standard is "misguided"). *See also* Carl F. Cranor et al., *Judicial Boundary Drawing and the Need for Context-Sensitive Science in Toxic Torts after* Daubert v. Merrell Dow Pharmaceuticals,

Inc., 16 VA. ENVTL. L.J. 1, 37-40 (1996) (arguing that epidemiological evidence should not be excluded simply because it reveals a relative risk less than 2.0, unless there is no other supporting evidence); Kaye, *supra*, 73 CORNELL L. REV. at 69 (arguing that it is fallacious to reason that "if the data are more probable under one hypothesis than another, then the former hypothesis is more likely to be true than the latter"); James Robins & Sander Greenland, *The Probability of Causation Under a Stochastic Model for Individual Risk*, 45 BIOMETRICS 1125, 1131 (1989) (concluding that proportional liability schemes cannot be based on epidemiological data alone).

B

Although we recognize that there is not a precise fit between science and legal burdens of proof, we are persuaded that properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case and that there is a rational basis for relating the requirement that there be more than a "doubling of the risk" to our no evidence standard of review and to the more likely than not burden of proof. *See generally DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 958-59 (3d Cir. 1990); Black & Lilienfeld, *supra*, 52 FORDHAM L. REV. at 767; *see also Daubert*, 43 F.3d at 1321; *Cook*, 545 F. Supp. at 308.

Assume that a condition naturally occurs in six out of 1,000 people even when they are not exposed to a certain drug. If studies of people who *did* take the drug show that nine out of 1,000 contracted the disease, it is still more likely than not that causes other than the drug were

responsible for any given occurrence of the disease since it occurs in six out of 1,000 individuals anyway. Six of the nine incidences would be statistically attributable to causes other than the drug, and therefore, it is not more probable that the drug caused any one incidence of disease. This would only amount to evidence that the drug *could* have caused the disease. However, if more than twelve out of 1,000 who take the drug contract the disease, then it may be *statistically* more likely than not that a given individual's disease was caused by the drug.

This is an oversimplification of statistical evidence relating to general causation, as we discuss below, but it illustrates the thinking behind the doubling of the risk requirement. For another viewpoint in this same vein, see ROBERT P. CHARROW & DAVID E. BERNSTEIN, WASHINGTON LEGAL FOUNDATION, SCIENTIFIC EVIDENCE IN THE COURTROOM: ADMISSIBILITY AND STATISTICAL SIGNIFICANCE AFTER *DAUBERT* 28-34 (1994), who advocate that there is a mathematically demonstrable relationship between relative risk and the more likely than not standard. They contend that a relative risk of slightly more than 2.0 will rarely, if ever, satisfy the legal causation standard. From a mathematical perspective, the probability of general causation changes as the level of statistical significance changes. *Id.* at 29-31. A relative risk of 2.2 may be sufficient to show more than a 50% probability at the 0.05 level (5 chances out of 100 that result occurred by chance), but not at the 0.10 level (10 chances out of 100). With calculations that we do not attempt to set out here, these commentators offer an example in which a relative risk ratio of 2.75 results in a probability of general causation of about 52% with a

statistical significance of 0.05, but only about a 43% probability of general causation with a statistical significance of 0.10. *Id.* at 31-32.

We recognize, as does the federal *Reference Manual on Scientific Evidence*, that a disease or condition either is or is not caused by exposure to a suspected agent and that frequency data, such as the incidence of adverse effects in the general population when exposed, cannot indicate the actual cause of a given individual's disease or condition. *See* Linda A. Bailey et al., *Reference Guide on Epidemiology, in* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 169 (1994). But the law must balance the need to compensate those who have been injured by the wrongful actions of another with the concept deeply imbedded in our jurisprudence that a defendant cannot be found liable for an injury unless the preponderance of the evidence supports cause in fact. The use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.

C

We do not hold, however, that a relative risk of more than 2.0 is a litmus test or that a single epidemiological test is legally sufficient evidence of causation. Other factors must be considered. As already noted, epidemiological studies only show an association. There may in fact be no causal relationship even if the relative risk is high. For example, studies have found that there is an association between silicone breast implants and reduced rates of

breast cancer. This does not necessarily mean that breast implants caused the reduced rate of breast cancer. *See* David E. Bernstein, *The Admissibility of Scientific Evidence After* Daubert v. Merrell Dow Pharmaceuticals, Inc., 15 CARDOZO L. REV. 2139, 2167 (1994) (citing H. Berkel et al., *Breast Augmentation: A Risk Factor for Breast Cancer?*, 326 NEW ENG. J. MED. 1649 (1992)). Likewise, even if a particular study reports a low relative risk, there may in fact be a causal relationship. The strong consensus among epidemiologists is that conclusions about causation should not be drawn, if at all, until a number of criteria have been considered. One set of criteria widely used by epidemiologists was published by Sir Austin Bradford Hill in 1965.[2] Another set of criteria used by epidemiologists in

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[2] The Bradford Hill criteria are summarized as follows:

1. Strength of association. "First upon my list I would put the strength of association. To take a very old example, by comparing the occupations of patients with scrotal cancer with the occupations of patients presenting with other diseases, Percival Pott could reach the correct conclusion because of the enormous increase of scrotal cancer in the chimney sweeps."

2. Consistency. "Next on my list of features to be specifically considered I would place the consistency of association. Has it been repeatedly observed by different persons, in different places, circumstances and times?"

3. Specificity. "If . . . the association is limited to specific workers and to particular sites and types of disease and there is no association between the work and other modes of dying, then clearly that is a strong argument in favor of causation."

studying disease is the Henle-Koch-Evans Postulates.[3] Although epidemiologists do not consider it necessary

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> 4. Temporality. "Which is the cart and which the horse?"
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> 5. Biological gradient. "Fifthly, if the association is one which can reveal a biological gradient, or dose-response curve, then we should look most carefully for such evidence. . . . The clear-dose response curve admits of a simple explanation and obviously puts the case in a clearer light."
>
> 6. Plausibility. "It would be helpful if the causation we suspect is biologically plausible. But this is a feature I am convinced we cannot demand. What is biologically plausible depends on the biological knowledge of the day."
>
> 7. Coherence. "The cause-and-effect interpretation of our data should not seriously conflict with the generally known facts of the natural history and biology of the disease."
>
> 8. Experiment. "Occasionally it is possible to appeal to experimental . . . evidence. . . . Here the strongest support for the causation hypothesis may be revealed."
>
> 9. Analogy. "In some circumstances it would be fair to judge by analogy. With the effects of thalidomide and rubella before us we would surely be ready to accept slighter but similar evidence with another drug or another viral disease in pregnancy."

Bernstein, *supra*, 15 CARDOZO L. REV. at 2167-68 (quoting Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROC. ROYAL SOC'Y MED. 295, 299 (1965)); *see also* Thompson, *supra*, 71 N.C. L. REV. at 268-74.

[3] *See, e.g.*, Black & Lilienfeld, *supra*, 52 FORDHAM L. REV. at 762-63; Christopher L. Callahan, *Establishment of Causation in Toxic Tort Litigation*, 23 ARIZ. ST. L.J. 605, 626 (1991); Michael Dore, *A Proposed Standard For Evaluating the Use of*

that all these criteria be met before drawing inferences about causation, they are part of sound methodology generally accepted by the current scientific community.

Sound methodology also requires that the design and execution of epidemiological studies be examined. For example, bias can dramatically affect the scientific reliability of an epidemiological study. *See, e.g.*, Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 138-43; Thompson, *supra*, 71 N.C. L. REV. at 259-61. Bias can result from confounding factors, selection bias, and information bias. Thompson, *supra*, 71 N.C. L. REV. at 260. We will not undertake an extended discussion of the many ways in which bias may cause results of a study to be misleading. We note only that epidemiological studies "are subject to many biases and therefore present formidable problems in design and execution and even greater problems in interpretation." Marcia Angell, *The Interpretation of Epidemiologic Studies*, 323 NEW ENG. J. MED. 823, 824 (1996).

We also note that some of the literature indicates that epidemiologists consider a relative risk of less than three to indicate a weak association. *See* Thompson, *supra*, 71 N.C. L. REV. at 252 (citing Ernest L. Wynder, *Guidelines to the Epidemiology of Weak Associations*, 16 PREVENTIVE MED. 139, 139 (1987)). The executive editor of the New England Journal of Medicine, Marcia Angell, has stated that "[a]s a general rule of thumb, we are looking for a relative risk

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Epidemiological Evidence in Toxic Tort and other Personal Injury Cases, 28 HOW. L.J. 677, 691 (1985); *see also* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 160-64.

of three or more [before accepting a paper for publication], particularly if it is biologically implausible or if it's a brand-new finding." Gary Taubes, *Epidemiology Faces Its Limits*, SCIENCE, July 14, 1995, at 168. Similarly, Robert Temple, the director of drug evaluation at the FDA, has said that "[m]y basic rule is if the relative risk isn't at least three or four, forget it." *Id.* We hasten to point out that these statements are contained in what is more akin to the popular press, not peer-reviewed scientific journals, and the context of those statements is not altogether clear. We draw no conclusions from any of the foregoing articles other than to point out that there are a number of reasons why reliance on a relative risk of 2.0 as a bright-line boundary would not be in accordance with sound scientific methodology in some cases. Careful exploration and explication of what is reliable scientific methodology in a given context is necessary.

D

A few courts that have embraced the more-than-double-the-risk standard have indicated in dicta that in some instances, epidemiological studies with relative risks of less than 2.0 might suffice if there were other evidence of causation. *See, e.g., Daubert*, 43 F.3d at 1321 n.16; *Hall*, 947 F. Supp. at 1398, 1404. We need not decide in this case whether epidemiological evidence with a relative risk less than 2.0, coupled with other credible and reliable evidence, may be legally sufficient to support causation. We emphasize, however, that evidence of causation from whatever source must be scientifically reliable. Post hoc, speculative testimony will not suffice.

A physician, even a treating physician, or other expert who has seen a skewed data sample, such as one of a few infants who has a birth defect, is not in a position to infer causation. The scientific community would not accept as methodologically sound a "study" by such an expert reporting that the ingestion of a particular drug by the mother caused the birth defect. Similarly, an expert's assertion that a physical examination confirmed causation should not be accepted at face value. In *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), a treating physician testified that he knew what radiation-induced cataracts looked like because they are clinically describable and definable and "cannot be mistaken for anything else." *Id.* at 1106. Nevertheless, his opinion that exposure to radiation caused the plaintiff's cataracts was found to be inadmissible because it had no scientific basis. The literature on which the expert relied did not support his assertion that radiation-induced cataracts could be diagnosed by visual examination. *Id.* at 1106-07. For a good discussion of the evils of "evidence" of this nature, see Bernstein, *supra*, 15 CARDOZO L. REV. at 2148-49. Further, as we discuss in Part VI(A), an expert cannot dissect a study, picking and choosing data, or "reanalyze" the data to derive a higher relative risk if this process does not comport with sound scientific methodology.

The FDA has promulgated regulations that detail the requirements for clinical investigations of the safety and effectiveness of drugs. 21 C.F.R. § 314.126 (1996). These regulations state that "[i]solated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered." *Id.*

§ 314.126(e). Courts should likewise reject such evidence because it is not scientifically reliable. As Bernstein points out, physicians following scientific methodology would not examine a patient or several patients in uncontrolled settings to determine whether a particular drug has favorable effects, nor would they rely on case reports to determine whether a substance is harmful. *See* Bernstein, *supra*, 15 CARDOZO L. REV. at 2148-49; *see also* Rosenberg, *supra*, 97 HARV. L. REV. at 870 (arguing that anecdotal or particularized evidence accomplishes no more than a false appearance of direct and actual knowledge of a causal relationship). Expert testimony that is not scientifically reliable cannot be used to shore up epidemiological studies that fail to indicate more than a doubling of the risk.

E

To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study. *See generally* Thompson, *supra*, 71 N.C. L. REV. at 286-88. Further, if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence

excluding those causes with reasonable certainty. *See generally E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 559 (Tex. 1995) (finding that the failure of the expert to rule out other causes of the damage rendered his opinion little more than speculation); *Parker v. Employers Mut. Liab. Ins. Co.*, 440 S.W.2d 43, 47 (Tex. 1969) (holding that a cause becomes "probable" only when "in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result").

In sum, we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.

Finally, we are cognizant that science is constantly reevaluating conclusions and theories and that over time, not only scientific knowledge but scientific methodology in a particular field may evolve. We have strived to make our observations and holdings in light of current, generally accepted scientific methodology. However, courts should not foreclose the possibility that advances in science may require reevaluation of what is "good science" in future cases.

V

Certain conventions are used in conducting scientific studies, and statistics are used to evaluate the reliability

of scientific endeavors and to determine what the results tell us. In this opinion, we consider some of the basic concepts currently used in scientific studies and statistical analyses and how those concepts mesh with our legal sufficiency standard of review. For an extended discussion of statistical methodology and its use in epidemiological studies, see *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 945-48 (3d Cir. 1990). *See also Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1353 n.1 (6th Cir. 1992); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 138-43, 171-78. We do not attempt to discuss all the multifaceted aspects of the scientific method and statistics, but focus on the principles that shed light on the particular facts and issues in this case.

A

One way to study populations is by a retrospective case-control or case-comparison epidemiological study. For example, this type of study identifies individuals with a disease and a suitable control group of people without the disease and then looks back to examine postulated causes of the disease. *See* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 136-38, 172. Another type of epidemiological study is a cohort study, or incidence study, which is a prospective study that identifies groups and observes them over time to see if one group is more likely to develop disease. *Id.* at 134-36, 173.

An "odds ratio" can be calculated for a case-control study. *Id.* at 175. For example, an odds ratio could be used

to show the odds that ingestion of a drug is associated with a particular disease. The odds ratio compares the odds of having the disease when exposed to the drug versus when not exposed. If the ratio is 2.67, the odds are that a person exposed to the drug is 2.67 times more likely to develop the disease under study.

Similarly, the "relative risk" that a person who took a drug will develop a particular disease can be determined in a cohort study. *Id.* at 173, 176. The relative risk is calculated by comparing the incidence of disease in the exposed population with the incidence of the disease in the control population. If the relative risk is 1.0, the risk in exposed individuals is the same as unexposed individuals. If the relative risk is greater than 1.0, the risk in exposed individuals is greater than in those not exposed. If the relative risk is less than 1.0, the risk in exposed individuals is less than in those not exposed. For the result to indicate a doubling of the risk, the relative risk must be greater than 2.0. *See id.* at 147-48.

Perhaps the most useful measure is the attributable proportion of risk, which is the statistical measure of a factor's relationship to a disease in the population. It represents the "proportion of the disease among exposed individuals that is associated with the exposure." *Id.* at 149. In other words, it reflects the percentage of the disease or injury that could be prevented by eliminating exposure to the substance. For a more detailed discussion of the calculation and use of the attributable proportion of risk, *see id.* at 149-50; Black & Lilienfeld, *supra*, 52 FORDHAM L. REV. at 760-61. *See also* Thompson, *supra*, 71 N.C. L. REV. at 252-56.

The numeric value of an odds ratio is at least equal to the relative risk, but the odds ratio often overstates the relative risk, especially if the occurrence of the event is not rare. For an example of the difference between the mathematical calculation of the odds ratio and the relative risk, see BARBARA HAZARD MUNRO & ELLIS BATTEN PAGE, STATISTICAL METHODS FOR HEALTH CARE RESEARCH 233-35 (2d ed. 1993). In the example given by Munro and Page, the odds ratio was 3.91, while the relative risk was only 3.0 based on the same set of data. *See also* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 149; Thompson, *supra*, 71 N.C. L. REV. at 250 n.22.

The relative risk may be expressed algebraically as:

$$RR = I_e \div I_c$$

where RR is the relative risk, I_e is the incidence of the disease in the exposed population, and I_c is the incidence of disease in the control population. A sample calculation is as follows:

- the incidence of the disease in exposed individuals (I_e) is 30 cases per 100 persons, or 0.3
- the incidence of the disease in the unexposed individuals (I_c) is 10 cases per 100 persons, or 0.1
- the relative risk is the incidence in the exposed group (0.3) divided by the incidence in the unexposed group (0.1), which equals 3.0

Using this hypothetical, can we conclude that people who are exposed are three times more likely to contract disease than those who are not? Not necessarily. The

result in any given study or comparison may not be representative of the entire population. The result may have occurred by chance. The discipline of statistics has determined means of telling us how significant the results of a study may be.

B

The first step in understanding significance testing is to understand how research is often conducted. A researcher tests hypotheses and does so by testing whether the data support a particular hypothesis. The starting point is the null hypothesis, which assumes that there is no difference or no effect. If you were studying the effects of Bendectin, for example, the null hypothesis would be that it has no effect. The researcher tries to find evidence *against* the hypothesis. *See* DAVID S. MOORE & GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 449 (2d ed. 1993); MUNRO & PAGE, *supra*, at 54. The statement that the researcher suspects may be true is stated as the alternative hypothesis. If a significant difference is found, the null hypothesis is rejected. If a significant difference is not found, the null hypothesis is accepted. MUNRO & PAGE, *supra*, at 54. This concept is important because it is the basis of the statistical test. *Id.*

A study may contain error in deciding to reject or accept a hypothesis, and this error can be one of two types. *Id.*; MOORE & MCCABE, *supra*, at 482-87. A Type I error occurs when the null hypothesis is true but has been rejected, and a Type II error occurs when the null hypothesis is false but has been accepted. MUNRO & PAGE, *supra*, at 55. An example of the two types of error given

by Munro and Page is a comparison of two groups of people who have been taught statistics by different methods. *Id.* Group A scored significantly higher than Group B on a test of their knowledge of statistics. The null hypothesis is that there is no difference between the teaching methods, but because the study indicated there was a difference, the null hypothesis was rejected. Suppose, however, that Group A was composed of people with higher math ability and that in actuality the teaching method did not matter at all. The rejection of the null hypothesis is a Type I error. *Id.*

The probability of making a Type I error can be decreased by changing the level of significance, that is, the probability that the results occurred by chance. *Id.* If the level of significance had been five in one hundred (0.05), there is only a five in one hundred chance that the result occurred by chance alone. If the level of significance is one in one hundred (0.01), there is only a one in one hundred chance that the result occurred by chance alone. However, as the significance level is made more stringent (*e.g.*, from 0.05 to 0.01), it will be more difficult to find a significant result. *Id.* Altering the significance level in this manner also increases the risk of a Type II error, which is accepting a false null hypothesis. *Id.* To avoid Type II errors, the level of significance can be lowered, for example, to ten in one hundred (0.1). *Id.*

Different levels of significance may be appropriate for different types of studies depending on how much risk one is willing to accept that the conclusion reached is wrong. Again, to take examples offered by Munro and Page, assume that a test for a particular stage, a child with the defect can be successfully treated. If the genetic

defect is not diagnosed in time, the child's development will be severely impaired. If a child is mistakenly diagnosed as having the defect and treated, there are no harmful effects. Most would agree that it would be preferable to make a Type I error rather than a Type II error under these circumstances. *Id.* A Type II error would be failing to diagnose a child that had the genetic defect.

Contrast that hypothetical with one in which a federal study is conducted to determine whether a particular method of teaching underprivileged children increases their success in school. *Id.* The cost of implementing this teaching method in a nationwide program would be very great. A Type I error would be to conclude that the program had an effect when it did not. *Id.* The significance level for this project would probably be higher than the one used to screen for genetic defects in the other hypothetical. In the genetic defects example, it is preferable to treat children even if they may not have the disease, but in the teaching method example, it is not preferable to teach children at considerable cost if it has no effect.

A confidence level can be used in epidemiological studies to establish the boundaries of the relative risk. These boundaries are known as the confidence interval. *See id.* at 59-63; *see also* David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 376-77, 396; MOORE & MCCABE, *supra*, at 432-37. The confidence interval tells us if the results of a given study are statistically significant at a particular confidence level. *See* MOORE & MCCABE, *supra*, at 432-33. A confidence interval shows a "range of values within which the results of a study sample would

be likely to fall if the study were repeated numerous times." Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 173. If, based on a confidence level of 95%, a study showed a relative risk of 2.3 and had a confidence interval of 1.3 to 3.8, we would say that, if the study were repeated, it would produce a relative risk between 1.3 and 3.8 in 95% of the repetitions. However, if the interval includes the number 1.0, the study is not statistically significant or, said another way, is inconclusive. This is because the confidence interval includes relative risk values that are both less than and greater than the null hypothesis (1.0), leaving the researcher with results that suggest both that the null hypothesis should be accepted and that it should be rejected. *See, e.g., Turpin*, 959 F.2d at 1353 n.1; *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 312 (5th Cir.), *as modified on reh'g*, 884 F.2d 166 (5th Cir. 1989); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 173. This concept was explained to the jury in this case by Dr. Glasser, one of the Havners' witnesses. Thus, a study may produce a relative risk of 2.3, meaning the risk is 2.3 times greater based on the data, but at a confidence level of 95%, the confidence interval has boundaries of 0.8 and 3.2. The results are therefore insignificant at the 95% level. If the researcher is willing to accept a greater risk of error and lowers the confidence level to 90%, the results may be statistically significant at that lower level because the range does not include the number 1.0. *See generally* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 151-55. "[T]he

narrower the confidence interval, the greater the confidence in the relative risk estimate found in the study." *Id.* at 173.

C

The generally accepted significance level or confidence level in epidemiological studies is 95%, meaning that if the study were repeated numerous times, the confidence interval would indicate the range of relative risk values that would result 95% of the time. *See DeLuca v. Merrell Dow Pharms., Inc.*, 791 F. Supp. 1042, 1046 (D.N.J. 1992), *aff'd*, 6 F.3d 778 (3d Cir. 1993); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 153; Dore, *A Proposed Standard*, *supra* note 3, 28 HOW. L.J. at 693; Thompson, *supra*, 71 N.C. L. REV. at 256. Virtually all the published, peer-reviewed studies on Bendectin have a confidence level of at least 95%. Although one of the Havners' witnesses, Dr. Swan, advocated the use of a 90% confidence level (10 in 100 chance of error), she and other of the Havners' witnesses conceded that 95% is the generally accepted level.

Another of the Havners' witnesses, Dr. Glasser, explained that in any scientific application, the confidence interval is kept very high. He testified that you "don't ever see [confidence intervals of 50% or 60%] in a scientific study because that means we're going to miss it a lot of times and [scientists] are not willing to take that risk." One commentator advocates that the confidence level for admissibility of epidemiological studies should be higher than the generally accepted 95% and should be 99%. *See* Dore, *A Proposed Standard*, *supra* note 3, 28 HOW.

L.J. at 693-95. *But cf. DeLuca*, 911 F.2d at 948 (discussing statistics expert Kenneth Rothman's view that the predominate choice of a 95% confidence level is an arbitrarily selected convention of his discipline); *Longmore v. Merrell Dow Pharms., Inc.*, 737 F. Supp. 1117, 1119-20 (D. Idaho 1990) (concluding that the scientific standard for determining causation is much stricter than the standard employed by the court and that confidence levels of 95%, 90%, or even 80% should not be required).

We think it unwise to depart from the methodology that is at present generally accepted among epidemiologists. *See generally* Bert Black, *The Supreme Court's View of Science: Has* Daubert *Exorcised the Certainty Demon?*, 15 CARDOZO L. REV. 2129, 2135 (1994) (stating that " '[a]lmost all thoughtful scientists would agree . . . that [a significance level of five percent] is a reasonable general standard' " (quoting Amicus Curiae Brief of Professor Alvan R. Feinstein in Support of Respondent at 16, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (No. 92-102))). Accordingly, we should not widen the boundaries at which courts will acknowledge a statistically significant association beyond the 95% level to 90% or lower values.

It must be reiterated that even if a statistically significant association is found, that association does not equate to causation. Although there may appear to be an increased risk associated with an activity or condition, this does not mean the relationship is causal. As the original panel of the court of appeals observed in this case, there is a demonstrable association between summertime and death by drowning, but summertime does not cause drowning. 907 S.W.2d at 544 n.8.

There are many other factors to consider in evaluating the reliability of a scientific study including, but certainly not limited to, the sample size of the study, the power of the study, confounding variables, and whether there was selection bias. These factors are not central to a resolution of this appeal, and we do no more than acknowledge that determining scientific reliability can have many facets.

VI

Armed with some of the basic principles employed by the scientific community in conducting studies, we turn to an examination of the evidence in this case measured against the *Robinson* factors. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). The evidence relied upon by the Havners' experts falls into four categories: (1) epidemiological studies; (2) *in vivo* animal studies; (3) *in vitro* animal studies; and (4) a chemical structure analysis of doxylamine succinate, the antihistamine component of Bendectin. We consider each in turn.

A

Dr. J. Howard Glasser, an associate professor at the University of Texas School of Public Health at the Texas Medical Center in Houston, is an epidemiologist with a Ph.D. in experimental statistics and a Master of Science of Bio-Statistics. He gave the jury an overview of statistics. As noted earlier, he explained that statistics are used to determine if there is a significant association between two

events or occurrences, but cautioned that a statistical association is not the same thing as causation.

Glasser identified a number of epidemiological studies from which he concluded that it was more likely than not that there is an association between Bendectin and birth defects, even though the authors of those studies did not find such an association. One study was done by Cordero and had a relative risk of 1.18 and a confidence interval of 0.65 to 2.13. However, the relative risk would need to exceed 2.0, and the confidence interval could not include 1.0, for the results to indicate more than a doubling of the risk and a statistically significant association between Bendectin and limb reduction birth defects. *See supra* Part V; *see also Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320 (9th Cir.) (on remand) (noting that more likely than not standard requires, in terms of statistical proof, a more than doubling of the risk), *cert. denied*, 116 S. Ct. 189 (1995). None of the other studies identified by Glasser showed a doubling of the risk. The McCredie study had a relative risk of 1.1 and a confidence interval of 0.8 to 1.5. The data in the Eskanzi study that considered limb reduction birth defects resulted in a relative risk of 4.18, but the confidence interval was 0.48 to 36.3, a very large interval that included 1.0. Dr. Glasser agreed that results with a confidence interval that included 1.0 or a lower number would be inconclusive and statistically insignificant.

Dr. Glasser did, however, reanalzye some data, called the Jick data, that had been included in a report to the FDA. Glasser isolated information on women who had filled two or more prescriptions of Bendectin and who were not exposed to spermicide, which resulted in a

relative risk of 13.0 of limb reduction birth defects. However, the confidence level he used was 90%. Further, there is no testimony or other evidence regarding the confidence interval. The confidence interval may or may not have contained 1.0.

The Havners also point to a memorandum prepared within the FDA that was identified by Dr. Glasser. The document indicates that the relative risk of limb defects when Bendectin is given within the first three lunar months of pregnancy is 2.13. The only conclusion drawn by Dr. Glasser from this memorandum is that, taken in conjunction with the other articles he had discussed, there is an "importance of time" and an "importance of exposure with the highest relative risk coming when the exposure period one to three lunar months is counted." The memo itself was not introduced into evidence, and there is no evidence of the confidence level at which the relative risk of 2.13 was found or of the confidence interval. The confidence interval may or may not have contained 1.0.

Finally, Glasser testified about published studies on Bendectin that did show statistically significant results, but they dealt with birth defects other than limb reduction defects. These studies cannot of course support a finding that Bendectin causes *limb reduction defects*. Further, later studies of these other types of birth defects did not bear out an association with Bendectin.

The other expert witness for the Havners who testified about epidemiological studies was Dr. Shanna Swan. She has a doctorate in statistics and is the Chief of the Reproductive Epidemiological Program for the state of

California. She also teaches epidemiology at the University of California at Berkeley.

Dr. Swan conceded that none of the published epidemiological studies found an association between Bendectin and limb reduction defects. She identified a number of these studies and confirmed that the confidence intervals in each of them included 1.0. However, Dr. Swan testified about these studies at some length and criticized the methodology. Then, relying on these same studies, she opined that Bendectin more probably than not is associated with limb reduction birth defects. Swan considered the findings of these studies in the aggregate and testified that the results fall along a curve in which the "weight of the curve" was in the direction of an increased risk. Yet, she also said that these studies were consistent with a relative risk that was between 0.7 and 1.8. That is not a doubling of the risk. It may support her opinion that it is more probable than not that there is an *association* between Bendectin and limb reduction defects, but the *magnitude* of the association she gleaned from these studies is not more than 2.0, based on her own testimony.

Dr. Swan also performed a reanalysis of data from at least two studies. One reanalysis was of raw *unpublished* data underlying the Jick study of limb reduction birth defects, the same data about which Dr. Glasser testified. Dr. Swan derived a relative risk estimate of 2.2 for women exposed to Bendectin during the first trimester. She also testified that the relative risk for women who were exposed to Bendectin but not exposed to spermicide was 8.8 and finally, that if women who were exposed to two or more Bendectin prescriptions were considered, without regard to exposure to spermicide, the relative

risk was 13 with a confidence interval from 3 to 53. She did not reveal the confidence level used in obtaining these results, and there is no evidence of the confidence level in the record.

The other reanalysis by Dr. Swan was of data in the Cordero study, which was based on information collected by the Center for Disease Control in Atlanta. An abstract she prepared regarding this data was published in the *Journal for the Society of Epidemiological Research* in 1983 or 1984 and states that the original Cordero study found the odds ratio for limb reduction birth defects to be 1.2. Swan concluded, however, that when a different control group is selected, the relative risk estimates are affected. Swan's abstract stated that, "under certain assumptions," which are not identified, "the odds ratio for limb reduction defects" are "a highly significant" 2.8. There is no explanation in the abstract or in Dr. Swan's testimony of the significance level used to obtain the 2.8 result. The result may well be statistically inconclusive at a 95% confidence level. We simply do not know from this record. Without knowing the significance level or the confidence interval, there is no scientifically reliable basis for saying that the 2.8 result is an indication of anything. Further, her choice of the control group could have skewed the results. Although her abstract does not identify what control group she used, Swan testified at trial that she chose births of Downs Syndrome babies. Swan's reanalysis using Downs Syndrome babies as the control group was considered in *Lynch* and in *Richardson*, and those courts likewise found it insufficient. *See Lynch v. Merrell-National Labs.*, 830 F.2d 1190, 1195 (1st Cir. 1987), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988); *Richardson v. Richardson-Merrell, Inc.*, 649

F. Supp. 799, 802 n.10 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988).

In addition to the statistical shortcomings of the Havners' epidemiological evidence, another strike against its reliability is that it has never been published or otherwise subjected to peer review, with the exception of Dr. Swan's abstract, which she acknowledges is not the equivalent of a published paper. Dr. Swan has published a number of papers in scientific journals, including a study that concluded Bendectin is not associated with cardiac birth defects. Although she has been testifying in Bendectin limb reduction birth defect cases for many years, Dr. Swan has never attempted to publish her opinions or conclusions about Bendectin and limb reduction defects. Similarly, studies by Dr. Glasser have been published in refereed journals, but none of his 32 to 33 publications mentions Bendectin or limb reduction birth defects.

As already discussed, there are over thirty published, peer-reviewed epidemiological studies on the relationship between Bendectin and birth defects. None of the findings offered by the Havners' five experts in this case have been published, studied, or replicated by the relevant scientific community. As Judge Kozinski has said, "the only review the plaintiffs' experts' work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters." *Daubert*, 43 F.3d at 1318 (commenting on the same five witnesses called by the Havners). A related factor that should be considered is whether the study was prepared only for litigation. Has

the study been used or relied upon outside the courtroom? Is the methodology recognized in the scientific community? Has the litigation spawned its own "community" that is not part of the purely scientific community? The opinions to which the Havners' witnesses testified have never been offered outside the confines of a courthouse.

Publication and other peer review is a significant indicia of the reliability of scientific evidence when the expert's testimony is in an area in which peer review or publication would not be uncommon. Publication in reputable, established scientific journals and other forms of peer review "increases the likelihood that substantive flaws in methodology will be detected." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993). One legal commentator has suggested that the ultimate test of the integrity of an expert witness in the scientific arena is "her readiness to publish and be damned." *Daubert*, 43 F.3d at 1318 (quoting PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 209 (1991)). Further, "the examination of a scientific study by a cadre of lawyers is not the same as its examination by others trained in the field of science or medicine." *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 831 n.55 (D.C. Cir. 1988) (quoting *Perry v. United States*, 755 F.2d 888, 892 (11th Cir. 1985)).

We do not hold that publication is a prerequisite for scientific reliability in every case, but courts must be "especially skeptical" of scientific evidence that has not been published or subjected to peer review. *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 313 (5th Cir.), *as modified on reh'g*, 884 F.2d 166 (5th Cir. 1989); *see also* Bert

Black et al., *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 778 (1994). Publication and peer review allow an opportunity for the relevant scientific community to comment on findings and conclusions and to attempt to replicate the reported results using different populations and different study designs.

The need for the replication of results was acknowledged by the Havners' witnesses. Moreover, it must be borne in mind that the discipline of epidemiology studies associations, not "causation" per se. Particularly where, as here, direct experimentation has not been conducted, it is important that any conclusions about causation be reached only after an association is observed in studies among different groups and that the association continues to hold when the effects of other variables are taken into account. *See, e.g.*, MOORE & MCCABE, *supra*, at 202.

As we have already observed, an isolated study finding a statistically significant association between Bendectin and limb reduction defects would not be legally sufficient evidence of causation. The Havners' witnesses conceded that when a number of studies have been done, it would not be good practice to pick out one to support a conclusion. As the federal *Reference Manual on Scientific Evidence* points out, "[m]ost researchers are conservative when it comes to assessing causal relationships, often calling for stronger evidence and more research before a conclusion of causation is drawn." Bailey et al., Reference Guide on Epidemiology, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 157. For example, Dr. Swan

explained that initially, some studies showed a statistically significant association between Bendectin and the birth defect pyloric stenosis. However, subsequent, much larger studies did not bear out that association, and in fact, Swan herself has published studies that failed to find an association between Bendectin and this type of birth defect.

Accordingly, if scientific methodology is followed, a single study would not be viewed as indicating that it is "more probable than not" that an association exists. *See, e.g., Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 802 n.10 (D.D.C. 1986) (noting that no single study would be sufficient to exonerate or to implicate Bendectin with certainty and that studies become "conclusive" only in the aggregate), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988). In affirming the district court in *Richardson*, the District of Columbia Circuit recognized that the plaintiffs' expert had recalculated epidemiological data and had obtained a statistically significant result. *See Richardson*, 857 F.2d at 831. The court nevertheless held this was not evidence that would support a verdict. *Id.* Courts should not embrace inferences that good science would not draw. *But cf. Lynch*, 830 F.2d at 1194 (asserting that a new study coming to a different conclusion and challenging the consensus would be admissible).

The argument is sometimes made that waiting until an association found in one study is confirmed by others will mean that early claimants will be denied a recovery. *See, e.g.*, Green, *supra*, 86 Nw. U.L. Rev. at 680-81; Wendy E. Wagner, *Trans-Science in Torts*, 96 Yale L.J. 428, 428-29 (1986). A related argument is that history tells us that the scientific community has been slow at times to accept

valid research and its results. While these observations are true, history also tells us that valid and reliable research and theories are generally accepted quickly within the scientific community when sufficient explanation is provided and empirical data are adequate. *See* Black et al., *supra*, 72 TEX. L. REV. at 779-82 (discussing Galileo, Pasteur, DNA, and continental drift).

Others have argued that liability should not be allocated only on the basis of reliable proof of fault because legal rules should have the goals of "risk spreading, deterrence, allocating costs to the cheapest cost-avoider, and encouraging socially favored activities," and because " 'consumers of American justice want people compensated.' " Rochelle Cooper Dreyfuss, *Is Science a Special Case? The Admissibility of Scientific Evidence After* Daubert v. Merrell Dow, 73 TEX. L. REV. 1779, 1795-96 (1995) (quoting Kenneth R. Feinberg, *Civil Litigation in the Twentieth-First Century: A Panel Discussion*, 59 BROOK. L. REV. 1199, 1206 (1993)). It has been contended that "[f]or some cases that very well may mean creating a compensatory mechanism even in the absence of clear scientific proof of cause and effect" and that "[d]eferring to scientific judgments about fault only obscures the core policy questions that are addressed by the laws that the court is applying." *Id.* We expressly reject these views. Our legal system requires that claimants prove their cases by a preponderance of the evidence. In keeping with this sound proposition at the heart of our jurisprudence, the law should not be hasty to impose liability when scientifically reliable evidence is unavailable. As Judge Posner has said, "[l]aw lags science; it does not lead it." *Rosen v. Ciba-*

Geigy Corp., 78 F.3d 316, 319 (7th Cir.), *cert. denied*, 117 S. Ct. 73 (1996).

B

The Havners relied on *in vivo* animal studies to support the conclusion that Bendectin causes limb reduction birth defects in humans. This evidence was presented by Dr. Adrian Gross, a veterinarian and a veterinary pathologist who had worked at the FDA from 1964 to 1979, served as the Chief of the Toxicology Branch at the Environmental Protection Agency from 1979 to 1980, and thereafter was a Senior Science Advisor at the EPA. Dr. Gross confirmed that the FDA and EPA consider animal studies in assessing the potential human response to drugs or pesticides. He testified that what will affect an animal is likely to affect humans in the same way and that the only reason animal studies are done is to predict if the drug at issue will have an adverse effect on humans.

Dr. Gross reviewed a number of animal studies that had been conducted on Bendectin. He described studies on rabbits exposed to Bendectin in which he saw "a lot of malformed kits." Gross testified about another study of rabbits that he found statistically significant. He opined that the probability that the malformations in this study occurred by chance were six in 10,000. With respect to another animal study on rabbits, he stated that the probability that the drug was harmless was less than one per 1,000,000. He listed studies on monkeys, rats, and mice showing "highly significant deleterious harmful effects as far as birth defects are concerned." Based on these animal

studies, Dr. Gross was of the opinion that Bendectin was teratogenic in humans, which means that it causes birth defects. However, he conceded that the dosage levels at which Bendectin became associated with birth defects in rats was at 100 milligrams per kilogram per day, which would be the equivalent of a daily dosage of 1200 tablets for a woman weighing 132 pounds.

The Havners assert in their briefing before this Court that the accepted technique for determining if a substance is a teratogen in humans is to look at all information, including epidemiological data, animal data, biological plausibility, and *in vitro* studies. Dr. Swan confirmed that these are the relevant sources of information in determining teratogenicity. *See also* Brent, *Comment on Comments on "Teratogen Update: Bendectin,"* TERATOLOGY 31:429-30 (1985) (stating process for determining if a substance is a teratogen: (1) consistent, reproducible findings in human epidemiological studies; (2) development of an animal model; (3) embryo toxicity that is dose related; and (4) consistency with basic, recognized concepts of embryology and fetal development). Thus, scientific methodology would not rely on animal studies, standing alone, as conclusive evidence that a substance is a teratogen in humans. *See Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371, 1375 (D.C. Cir. 1997) (noting that the only way to test whether data from nonhuman studies can be extrapolated to humans would be to conduct human experiments or to use epidemiological data); *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1071 (6th Cir. 1993) (holding that expert opinion indicating a basis of support in animal studies is admissible but is simply inadequate to permit a jury to conclude that Bendectin more probably than not causes

limb defects); *Lynch*, 830 F.2d at 1194 (asserting that *in vivo* and *in vitro* animal studies singly or in combination do not have the capability of proving causation in human beings in the absence of any confirming epidemiological data); *see also Brock*, 874 F.2d at 313 (recognizing that animal studies are of very limited usefulness when confronted with questions of toxicity); *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 197 (5th Cir. 1996) (quoting and following *Brock* in toxic tort case).

We further note that with respect to the *in vivo* studies about which Dr. Gross testified, their reliability as predictors of the effect of Bendectin in humans is questionable because of the dosage levels. Dr. Gross offered no explanation of how the very high dosages could be extrapolated to humans. Other courts have rejected animal studies that relied on high dosage levels as evidence of causation in humans. *See, e.g., Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349 (6th Cir. 1992) (reasoning that to eliminate drugs toxic to embryos at high dosage levels would eliminate most drugs and many useful chemicals on which modern society depends heavily) (citing James Wilson, *Current Status of Teratology, in* HANDBOOK OF TERATOLOGY 60 (1977)). Gross also failed to explain why the published studies from which he extracted his data had concluded Bendectin was not harmful.

The *in vivo* studies identified in this case cannot support the jury's verdict.

C

Dr. Stuart Allen Newman also relied on animal studies to support his opinion that Bendectin is a teratogen in humans. Dr. Newman holds a doctorate in chemical physics and is a professor at New York Medical College. He has published over fifty articles, although none contain the opinions or conclusions to which he testified in this case.

The studies Newman reviewed were *in vitro* studies, which are based on tests conducted on cells in a test tube or petri dish. Doxylamine succinate was placed directly on the limb bud cells of animals including chickens and mice. The development of cartilage was affected. Newman acknowledged that in these studies, the researchers who had conducted them concluded only that doxylamine succinate was potentially capable of inducing genetic damage and that it should be tested on other systems. But Newman testified that if you find an effect that prevails across a number of different species, "you can be awfully sure that the same thing will prevail in humans."

Newman opined that Kelly Havner's defect was due to loss of portions of the skeleton that *could* with scientific certainty have been caused by a teratogen that affected the embryo. Similarly, he testified that the findings of one study, the Hassell/Horigan Study, indicated to him that doxylamine succinate can interfere with chondrogenesis, which is the process of certain cells turning into cartilage. We note that testimony to the effect that a substance "could" or "can" cause a disease or disorder is not evidence that in reasonable probability it does. *See, e.g.,*

Parker v. Employers Mut. Liab. Ins. Co., 440 S.W.2d 43, 47 (Tex. 1969); *Bowles v. Bourdon*, 219 S.W.2d 779, 785 (1949). Newman testified, however, that based on the Hassell/Horigan and other animal studies, he concluded with a reasonable degree of medical certainty that doxylamine succinate is a teratogen for cartilage development and that doxylamine succinate is a teratogen in humans. He also testified that he had reviewed the records surrounding Marilyn Havner's pregnancy and that to a reasonable certainty, she was not exposed to any teratogen other than Bendectin.

The *in vitro* studies are similar to the cell biology data at issue in *Allen v. Pennsylvania Engineering*, 102 F.3d at 198. The fact that Bendectin may have an adverse effect on limb bud cells is "the beginning, not the end of the scientific inquiry and proves nothing about causation without other scientific evidence." *Id.*; *see also Richardson*, 857 F.2d at 830 ("Positive results from *in vitro* studies may provide a clue signaling the need for further research, but alone do not provide a satisfactory basis for opining about causation in the human context."); Bailey et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENDE, *supra*, at 130-31 (noting that the problem with *in vitro* studies is extrapolating the findings "from tissues in laboratories to whole human beings").

Logical support for Dr. Newman's opinions was also lacking. A number of substances, such as vitamin C, have been shown to damage animal cells when placed directly on tissue. Dr. Newman offered no explanation of how he made the logical leap from the *in vitro* studies on animal tissue to his conclusion that Bendectin causes birth

defects in humans. Dr. Newman's testimony is not evidence of causation.

D

Of the five witnesses who testified on the question of causation, the only witness who opined that Bendectin was the cause of Kelly Havner's birth defect, as opposed to birth defects in general, was Dr. John Davis Palmer. Dr. Palmer is a licensed medical doctor and holds a doctorate in pharmacology. He is a professor at the University of Arizona College of Medicine and the acting head of its Pharmacology Department. His opinion was based in part on the testimony of the Havners' other witnesses.

Dr. Palmer testified that there is a critical period during gestation when the limbs of a fetus are forming. Marilyn Havner took Bendectin somewhere between the 32nd and 42nd day of gestation, depending on how the date of conception is calculated, which was within the period for the development of Kelly Havner's hand and arm. Palmer explained that the molecular structure of doxylamine succinate, one of the two components of Bendectin, permits it to cross the placenta from the mother's body and reach the fetus. Based on this fact and on *in vitro* animal studies, intact animal studies, and epidemiological information, he concluded that doxylamine succinate is a teratogen in humans. Relying on this same information and on information concerning Kelly Havner, including the date her mother ingested Bendectin, Dr. Palmer concluded that to a reasonable degree of medical certainty, Bendectin caused the birth defect seen in Kelly Havner's hand.

However, Dr. Palmer's testimony is based on epidemiological studies that conclude just the opposite. To the extent that he relied on the opinions of Drs. Swan, Glasser, Newman, or Gross, there is no scientifically reliable evidence to support their opinions, as we have seen. Palmer identified no other study or body of knowledge that would support his opinion, other than the chemical structure of doxylamine succinate and a study done on antihistamines, not Bendectin. The Sixth Circuit captured the essence of Dr. Palmer's testimony when it said, "no understandable scientific basis is stated. Personal opinion, not science, is testifying here." *Turpin*, 959 F.2d at 1360. That court further observed that Dr. Palmer's conclusions so overstated their predicate that it could not legitimately form the basis for a jury verdict. *Id.* We agree with that observation based on the record in this case.

* * *

There is no scientifically reliable evidence to support the verdict in this case. Accordingly, we reverse the judgment of the court of appeals in part and render judgment for Merrell Dow.

Priscilla R. Owen
Justice

OPINION DELIVERED: July 9, 1997

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THRITEENTH DISTRICT OF TEXAS

Argued on March 19, 1996

JUSTICE SPECTOR, concurring.

The Court today fails to heed its own warning that "the examination of a scientific study by a cadre of lawyers is not the same as its examination by others trained in the field of science or medicine." ___ S.W.2d at ___ (internal citations omitted). I agree that the Havners' expert witness testimony is not legally sufficient evidence of causation. However, as a judge, and not a scientist, I am uncomfortable with the majority's ambitious scientific analysis and its unnecessarily expansive application of the *Daubert* standard. The majority's opinion, replete with

dicta, gives courts no practical guidance outside the context of Bendectin litigation. Accordingly, I concur only in the judgment of the Court.

Rose Spector
Justice

OPINION DELIVERED: July 9, 1997

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THRITEENTH DISTRICT OF TEXAS

Argued on March 19, 1996

JUSTICE GONZALEZ, concurring.

I join the Court's opinion and judgment. I write separately to reiterate that the guidelines we established in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), are not limited to expert testimony based on a novel scientific theory.

In *Robinson*, we held that Texas Rule of Evidence 702 requires the proponent of scientific expert testimony to show that the testimony is both relevant and reliable. *Robinson*, 923 S.W.2d at 556. In doing so, we followed the lead of the United States Supreme Court and the Texas Court of Criminal Appeals and adopted a list of non-

exclusive factors for determining whether such testimony is admissible.[1] *See id.* at 554-57 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)). Here, the Court applies the *Robinson* criteria to Merrell Dow's legal sufficiency challenge and concludes that the Havners' expert testimony is no evidence of causation. ___ S.W.2d ___. I agree with this approach. But I am concerned that some litigants may misread *Robinson* to apply only to novel scientific evidence because of my later writings applying it to "junk science" cases. *See S.V. v. R.V.*, 933 S.W.2d 1, 26 (Tex. 1996) (Gonzalez, J., concurring); *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995) (Gonzalez, J., concurring).

Recently, the Court of Criminal Appeals addressed a similar attack on *Kelly*, that court's equivalent of *Robinson*. In rejecting this argument, the court stated:

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[1] These factors are:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of that theory or technique.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995) (citation and footnote omitted).

> Nowhere in *Kelly* did we limit the two-pronged standard to novel scientific evidence. The [United States] Supreme Court in *Daubert* directly addressed the issue in a footnote, stating "[a]lthough the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specifically or exclusively to unconventional evidence." *Daubert*, 509 U.S. at 593 n.11, 113 S. Ct. at 2796 n.11. The Supreme Court noted that "under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589, 113 S. Ct. at 2795 (emphasis added). We likewise see no value in having a different standard of admissibility for novel scientific evidence. The problems presented in determining whether or not a particular type of evidence would be considered "novel" are daunting enough to reject application of a dual standard. Moreover, we observe that the factors and criteria set forth in *Kelly* as bearing upon the reliability of proffered scientific evidence are adequate measure for assuring that "novel" scientific evidence which is "junk science" is excluded. These factors "address the soundness of the underlying scientific theory and technique." *Jordan v. State*, 928 S.W.2d 550, 554 (Tex. Crim. App. 1996). . . .

Hartman v. State, 1997 WL 195084, at *3, ___ S.W.2d ___, ___ (Tex. Crim. App. Apr. 23, 1997). This analysis applies equally to *Robinson*. As I have said before, we intended *Robinson* to "provide the exclusive standard for evaluating the reliability of expert testimony about anything characterized as science." *S.V. v. R.V.*, 933 S.W.2d at 42 (Gonzalez, J., concurring on rehearing). We did not

intend to free from *Robinson*'s grasp what might be considered routine science.

The Havners attempted to prove causation primarily through expert testimony based on epidemiological and animal studies. These foundations are by no means novel. By applying the *Robinson* factors to Merrell Dow's no-evidence challenge, the Court implicitly holds that *Robinson* applies to scientific expert testimony across the board. The trial court must only determine whether the evidence is relevant and reliable. *See Robinson*, 923 S.W.2d at 556. It need not decide whether the evidence is also novel.

Raul A. Gonzalez
Justice

OPINION DELIVERED: July 9, 1997

APPENDIX B

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,
Petitioner,

vs.

ERNEST and MARILYN HAVNER,
on Behalf of Their Minor Child, KELLY HAVNER,
Respondents.

On Application for Writ of Error to the Court of Appeals for the 13th Supreme Judicial District Corpus Christi, Texas

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RESPONDENTS' MOTION FOR REHEARING

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NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

vs.

ERNEST and MARILYN HAVNER,
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Respondents.

On Application for Writ of Error to the Court of Appeals for the 13th Supreme Judicial District
Corpus Christi, Texas

RESPONDENTS' MOTION FOR REHEARING

TO THE HONORABLE MEMBERS OF THE SUPREME COURT OF TEXAS:

COME NOW Respondents, Ernest and Marilyn Havner, on behalf of their minor child, Kelly Havner, in the above styled and numbered matter, and pursuant to Rule 190(b), of the Texas Rules of Appellate Procedure, serve and file this Respondents' Motion for Rehearing, which rehearing Petitioners seek to correct certain errors in the original decision by this Court, issued July 9, 1997.[1]

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[1] Respondents attach a copy of the Court's decision as "Exhibit 1." Respondents use the same abbreviations and record reference citation as they did in their response to Merrell Dow's application.

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The Court erred in reversing and rendering when, given the new developments of law promulgated by the Court's decision, justice requires that the Court remand this case to the trial court for a new trial in order that Respondents (Plaintiffs) may put forth their best case in accordance with the law of the State of Texas 6

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III.

STATEMENT OF THE CASE FOR REHEARING

Outlined against a hazy July sky, the four horsemen rode again last Wednesday, July 9, 1997. You know them: Pestilence, Death, Famine, and this Texas Supreme Court.

Shucking its collective black robe and confidently donning the familiar, white lab coat, its royal blue cursive name artfully inscribed above the pocket, this Court has taken on the world of science. Almost. Instead, its *Havner* decision is no more than a detailed, 58-page, science fiction, filled with skewed observations and prissy platitudes, which reads like a corporate instruction book on the new rules to a childhood game.

This Texas Supreme Court, fervent to follow the law laid out for it by those who would kill and injure for profit, stand stiffly in a row, nine nutty professors, hands clasped tightly together, shoulder to shoulder, chanting with glazed eyes and cultlike precision, "Red rover, red rover, let Kelly Havner come over." Then this Court coldly stares as a beautiful little girl, maimed by the poison of Merrell Dow, runs toward it with the innocence and sparkle of a child, smiling, believing in what her

mom and dad taught her of right and wrong, of love and justice. She also believed somehow, that judges should be her fair shield, her protectors, her chance to know equality when pitted against the open corporate vault of America's companies.[2] So she trustingly approaches this line, this impenetrable line. This Court gleefully bounces her back, tosses her forever out the courthouse window, as it mumbles inanely of "green cheese" on the moon. Just as Merrell Dow's decision to make money at the life-time expense of babies across the country was made long before the first Bendectin pill ever was prescribed, so this Court's decision was made long before it heard of Kelly. This decision succeeds only in showing the caricature that occurs when politics becomes a branch of science.

As Respondents attempted to explain to this Court in their Motion to Recuse Justice Baker (which this Court dismissed as moot), when they notified it that Merrell Dow's lawyer, John Hill, signed off on a campaign letter printed on Justice Baker's campaign stationery (dated seven days after oral argument in Kelly Havner's case and which sought to raise a half-million dollars for Justice Baker[3]): Texas juries are better left to hear evidence on scientific matters, and decide that evidence's weight, than Judges who may be beholden to the lawyers appearing before them.

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[2] Respondents attach a copy of Kelly Havner's own statement, which she wrote for school, after witnessing oral argument in this cause, as "Exhibit 2."

[3] Respondents attach a copy of their Motion to Recuse as "Exhibit 3."

Members of this Court have been quick to point out, in light of the history of courts before it, that the perception long has been that justice is for sale in Texas. John Hill's letter reminded prospective contributors to Justice Baker of the need to continue the reform that this Supreme Court has claimed to champion. However, what is brought home by John Hill's letter, is the continued existence of those undeniably real dangers faced by elected, judicial officials – including this Court – who depend on the financial munificence and political influence of the lawyers appearing in front of them.

It is for this very reason that evidentiary matters ought to be weighed in the jury box, and not in the ballot box. For our civilization decided long ago that Justice is a thing too important to be entrusted to trained men. When the goal is Justice, we are to collect 12 ordinary people standing around. The Founder of Christianity took the same approach.

One day soon, an elected, state district judge, anywhere in Texas, holding the *Havner* decision and trying to comprehend what this Court meant and, more importantly, how to rule on an issue of science, may face the same type of dilemma. Perhaps the attorney arguing before this trial judge will have spearheaded his campaign in order to "continue a program of reform," just as did John Hill in his fund-raising efforts for his friend, Justice Baker. And perhaps the other party before the trial court, like Kelly Havner, will have no such friend, grateful for the favor.

The trial court judge will know one thing for certain as a result of this Court's decision: he has the power to

engage in an entirely subjective and practically non-reviewable decision regarding a scientific expert's testimony. More than that, the trial judge will be staring at past contributors who are asking for a ruling, and who know, too, that the subjectivity now bestowed on the Texas trial courts – which subjectivity is inherent in the *Havner* opinion – will insure any bias or 'fudging' remains unprovable, should it occur.

Judges and legislators alike necessarily face the temptations of money, fame, and power – which include the temptation to disregard justice and sell rights, to violate the liberties of the people. Juries do not. Coming on the heels of a court made famous on television news programs for its reputation as a court up for sale, of a court in need of reform, this Court – more than any other – should realize that its decision promotes a continued sense of fear (on both sides of the docket) that trial courts have unlimited power; here, what is fearful is the subjective ability to pluck any case from the jury box and decide, under *Havner,* to make a decision from the bench.

Unfortunately, the hurdle before future litigants has no objective height. Perhaps because of the particular torch passed to this Court by its more plaintiffs'-oriented predecessor, it has felt the need to carry the flame on a new, yet not so different, path. This reaction is well-recognized throughout history. As Samuel Taylor Coleridge observed, "Every reform, however necessary, will by weak minds be carried to an excess, which will itself need reforming."

It would seem, if this Court is to erase the Sixth Amendment from the United States Constitution, and the

Due Course of Law and Open Courts provisions of Article 1 of the Texas Constitution, it would offer something in their place. Yet this Court offers Kelly Havner no truth. No real truth. Rather, it appears to hope that there are some who would still watch its procession and pretend to marvel at its finery, so it drapes itself in 58 pages of contrived reasoning. This Court struggles mightily to conceal what for some time has been open and known: The Texas Supreme Court has no clothes.

The truth, which Kelly Havner deserved, did not need 58 pages and 16 months to prepare. The truth could have been delivered from this dark-paneled Court on the day of oral argument, by the nine judges whose names history will soon forget. A simple, painful truth: No little girl, or anyone else, will take away corporate money, no matter what – not on our watch. Instead, nodding somberly at each other, as science is heady business, this Texas Supreme Court keeps Justice at bay with a Humpty Dumpty logic, "Evidence means just what we choose it to mean – neither more nor less."

The following pages speak the truth. Kelly Havner tried her case consistently with the only law existing at the time of trial. She adhered to the standard, she met her burden, she followed the rules, and a Nueces County jury, dressed not in black robes but in plain street clothes, listened to both sides and found the truth. Now, this Court changes the rules, long after her case has reached a verdict, after five long years on appeal. And she loses. More astoundingly, this Court decides that Kelly Havner has no right to try her case under these new rules.

If this record is read objectively, considering the state of the law at the time of trial, and if the record is given the weight owed it through a sense that law and the love coming from the law are one and the same, then Kelly Havner's verdict should be affirmed. If Kelly Havner's case creates new law, which did not exist at trial, then her case should be remanded.

If there still exists, even in today's polarized times, some deep-felt belief that this record *and the law under which it was tried* should be closely examined, read word for word, page by page, by those individual Judges who chose to ask the people of this State permission to wear a black robe, not a white lab coat, and who gave a promise, an oath, in exchange for that privilege, then Kelly Havner will know Justice. She should not have to ask for such attention, she was promised it by being lucky enough to be a little girl growing up in this State, protected by its courts. Or, this Court can simply defer to other courts in other cases, pronounce a new rule, declare that five years ago Kelly did not follow the new rule, but, instead, followed the rule as it existed at the time, and then rubber stamp the rights of Kelly Havner and her fellow Texans with what has become this Court's tiresome slogan when asked to protect those injured by the powerful and elite: DENIED. Most likely the order already has been given, and the proclamation is sharp and clear:

> Justice is no longer for sale in Texas, the money has been escrowed, the deed has been signed, the deal has been done.

IV.

POINT OF ERROR FOR REHEARING

REHEARING POINT OF ERROR NO. 1:

The Court erred in reversing and rendering when, given the new developments of law promulgated by the Court's decision, justice requires that the Court remand this case to the trial court for a new trial in order that Respondents (Plaintiffs) may put forth their best case in accordance with the law of the State of Texas.

V.

BRIEF OF THE ARGUMENT

Judges and litigants, defense and plaintiffs' counsel – all may dispute the philosophical underpinnings and wisdom of this Court's decision reversing the jury's verdict in favor of Kelly Havner. But few will be able to take this decision and try, defend, or rule in a case involving scientific evidence. Regardless of its unmanageability in terms of application, however, the Court's decision is now the law. The 8 to 0 opinion issued by the highest court of the State of Texas unequivocally expresses the rule that, in cases of what the Court terms "novel, scientific evidence," the party seeking to admit such evidence faces an extraordinarily high hurdle, to be set by a trial judge. That judge may decide to set it so low as to be easily stepped over, or so high as to require that it be pole-vaulted over. Either way, it is adjusted by virtually unreviewable discretion; moreover, until the trial judge chooses the height and rules on whether the jump is successful, there is no jury trial.

The Court's decision requires from both the offering party's experts and its counsel, as well as those for the opposing party, participation in a guessing game. Perhaps the elusive standards are 'meetable.' Cases involving novel scientific evidence will continue as viable and, more importantly, 'triable' solely at the discretion of an elected official who brings to the equation all the follies of his or her bench.

What clearly is *not* 'meetable,' and not 'triable,' of course, is a standard that does not exist at the time that a party offers its evidence but is applied retroactively, any way. Such an application results in injustice.

Kelly Havner came before the trial court with a case consisting of, among other things, the support of experts who the United States Supreme Court expressly has recognized as eminently qualified. She put forth the evidence necessary, *given the standard of law in existence at the time of trial.*

Disregarding the careful and thorough preparation of a serious case involving chemical deformation of a little girl, and disregarding the presentation of qualified experts on the complex issue of causation – for this is *not* a case in which anyone has testified that the moon is made of green cheese – the court's decision punishes Kelly Havner by denying her a chance to try her case under the Court's new standard. This result does not square with the law of Texas, as recognized by members of this court on numerous occasions. Nor does this result do honor to Justice.

All that Respondents seek on rehearing is to have this court acknowledge the inherent fairness in allowing

Kelly Havner's case to return to the trial court and be tried under the new rules. Respondents ask the Court to allow them, once again, to take up Petitioners' challenge and fight on an even field – each party subject to the benefits and costs of the standard of sufficiency that, at least for now, applies.

Petitioners contend this case amounts to claims based on 'junk science.' The Court appears to agree. If so, if Petitioners are right, then, in light of the extraordinary standard now in effect in such cases, Petitioners will win. Respondents believe, however, that *they* will win, again, because, had the standard at issue here existed at the time of suit, Respondents would have adduced precisely the evidence the Court currently contends does not exist in the record. Regardless of whether Respondents win or lose on remand, however, the idea that this Supreme Court would change the law and then deny Kelly Havner the opportunity to retry her case, under the new law, should cause every member of this Court to tremble.

A. The Court's Decision Does Not Explain Old Law, It Creates New Law.

1. The Original Standard for Legal Sufficiency of Expert Scientific Evidence (*Duff v. Yelin*).

In 1988, the Court held that the standard of legal sufficiency applicable to cases predicated upon scientific evidence was as follows:

> [T]he plaintiff must prove, by competent testimony, that the defendant's negligence proximately caused the plaintiff's injury. [. . .] Additionally, and of great importance in this

> case, the plaintiff must establish a causal connection beyond the point of conjecture; proof of mere possibilities will not support the submission of an issue to the jury. [. . .] Although this court has held that it is not absolutely necessary that an expert couch his opinions in terms of a "reasonable medical probability," we still embrace the principle that a jury issue should not be submitted when it is based merely upon speculation and conjecture. [. . .]

Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988) (citations omitted).

Kelly Havner tried her case, beginning in 1992. At this time, the standard of *Duff v. Yelin* applied. Kelly Havner met this standard by not only offering expert testimony (which is the only evidence the Court's decision addresses), but also by adducing concessions and admissions by Merrell Dow's experts, as well as by admissions made in studies upon which Merrell Dow relied in whole or in part, which this Court ignored in its entirety.

For evidence legally sufficient under *Duff v. Yelin*, as provided by Respondents' experts, Respondents refer the Court to their response to Merrell Dow's application ("Response") for record citations in support of the following evidence regarding what constitutes the proper, reliable, scientific method:

(i) a proper, scientific methodology to determine whether a substance is a teratogen considers all data, including *in vitro* studies, animal studies, published data, raw data, unpublished data, chemical structure analysis, and epidemiological work (Response at 31);

(ii) proper methodology *does not* rely on epidemiology alone, much less on Merrell Dow's epidemiological conclusions alone (Response at 31-32);

(iii) animal studies are part of the methodology used in determining teratogenicity (Response at 32-33);

(iv) *in vitro* studies are part of the methodology used in determining teratogenicity (Response at 33);

(v) drug experience reports are part of the methodology and principles in determining teratogenicity (Response at 33).

Indeed, each of Kelly Havner's experts testified that their theory or technique or methodology was "generally accepted" within their field of expertise and that they applied it as such. (*See, e.g.*, Dr. Gross – S.F. XIV, p. 216; Dr. Newman – S.F. XV, pp. 443, 488-89; Dr. Palmer, S.F. XVI, pp. 625-26 & 647.)

Regarding the legal sufficiency of this reliable, scientific evidence, Respondents refer the Court to the following record citations; should no other part of this motion be read or considered, the following eight points are branded forever on the hide of this record – *read this:*

(i) The form of Bendectin at issue here consists of only two components: Doxylamine succinate and the vitamin B-6 (NB: Merrell Dow does not contest this fact.);

(ii) Doxylamine succinate is an antihistamine that crosses the placental barrier in both

animal and human fetuses (S.F. XVI, pp. 637-38);

(iii) Bendectin crosses the placental barrier in both animal and human fetuses (*id.*);

(iv) The accumulation of doxylamine succinate and Bendectin in both animal and human fetuses causes limb defects – they are teratogens (S.F. XVI, pp. 637-38 (animals), S.F. XIV, p. 279 (animals), S.F. XIV, pp. 291-92 (animals), S.F. XIV, pp. 299-300 (animals and humans), S.F. XV, p. 498 (humans), and S.F. XVI, pp. 672-73 (humans);

(v) During the time period of fetal limb development, Kelly Havner's mother ingested Bendectin (S.F. XV, pp. 535-36);

(vi) Kelly Havner's mother consumed no other teratogen during this time period other than Bendectin (S.F. XV, p. 554);

(vii) Kelly Havner's limb defect is not of genetic origin and is consistent with teratogenic defects (S.F. XIII, pp. 107-08, 113 & S.F. SV XV, p. 537); and

(viii) Kelly Havner's mother's consumption of the teratogen Bendectin during this critical time period of fetal development caused the limb defect Kelly Havner bears today (S.F. XVI, pp. 675-77 & S.F. XV, pp. 526-27, 535-36, and 554).

Regarding legally sufficient evidence from Merrell Dow's own experts, Respondents direct the Court to Drs. Friedman's and Lamm's testimony, both of which meet *Duff v. Yelin* (as well as the Court's decision here, which

chooses for some reason to ignore their testimony). Dr. Friedman, again, Merrell Dow's expert, testified that the "Shiono article," which addresses Bendectin and limb defects, *reflects a more than doubling of limb defect frequency.* (S.F. XXI, p. 1690). Dr. Lamm, again, also Merrell Dow's expert, acknowledged in reviewing the *Jick* data, that if the confounding factor of spermicide is removed, there is a statistically significant finding for Bendectin in limb defects. (S.F. XVIII, p. 120-23).[4]

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[4] The Court dismisses the Jick study cursorily, commenting that the Havner's expert, Dr. Glasser, "[D]id, however, reanalyze *some data,* called the Jick data, that had been included in a report to the FDA. Glasser isolated information on women who had filled two or more prescriptions of Bendectin and who were not exposed to spermicide, which resulted in a relative risk of 13.0 of limb reduction [. . . .]" (Opinion at 40 (emphasis added).) It is not at all clear why a study favorable to Kelly Havner is referred to as "some data," as if it were an inconsequential aside in the scientific spectrum. Regardless, the Court chooses to ignore Dr. Glasser's testimony because there was no evidence regarding the confidence interval applicable to this study. (*Id.*) The Court fails to address, however, the significance of Dr. Lamm's testimony (Dr. Lamm being Merrell Dow's expert), which confirmed Dr. Glasser's conclusion as "very statistically significant" *and* specifically contradicted Justice Owen's insistence on the necessity of adopting a 95% confidence level (S.F. XVIII at 1134). Perhaps the Court confused the standard of considering only the evidence favorable to a successful party's position (Opinion at 9) with its own standard of considering only a plaintiff's evidence, and then only in the light least favorable to the plaintiff.

2. **Expert, Scientific Evidence Law Post-*Robinson* and Pre-*Havner*: The Standard of Review as to Admissibility.**

The Court decided, in 1995, three years after Kelly Havner's verdict, to address for the first time whether its 1983 promulgation of Rule 703 of the Texas Rules of Civil Evidence reflected a change in the standard of admissibility of expert testimony. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Court concluded that rule 703, in fact, did change the standard of admissibility, enumerating its famous list of factors to consider. *Id.* at 557. The court further explicitly stated that *Robinson* did not address the standard of legal sufficiency and that *Duff v. Yelin*, 751 S.W.2d at 175, continued to control on this issue. *Robinson*, 923 S.W.2d at 554.

The Court of Appeals considered Kelly Havner's case under the *Duff v. Yelin* standard, as *Robinson* mandates. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 907 S.W.2d 535, 541 (Tex. App. – Corpus Christi 1995) (op. on reh'g). The Court docketed the appeal pre-*Robinson* (1992) and issued its opinion on rehearing post-*Robinson* (August 1995) – during both time periods, this Court assured trial lawyers in Texas that *Duff v. Yelin* controlled. The Corpus Christi court nevertheless considered the *Robinson* factors, which it noted applied to admissibility issues but, nonetheless, were relevant to its analysis. *Havner*, 907 S.W.2d at 549-57. Likewise, the Corpus Christi court also considered *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which decision the U.S. Supreme Court issued during the intermediate appeal pendency of Kelly Havner's case. *Havner*, 907 S.W.2d at 550 (op. on

reh'g). Stated succinctly, at no point did this court suggest that a different standard applied. To the contrary, it assured everyone that *Duff v. Yelin* still applied.

3. The Law in Light of the Court's Decision in *Havner: The New Standard of Review as to Legal Sufficiency.*

In 1997, barely two weeks ago, nine years after Kelly Havner first brought suit against Merrell Dow, five years after she tried her case to a jury, five years after Merrell Dow began this appeal, this Court for the first time held that a standard other than that described in *Duff v. Yelin* applied and that it had to reverse and *render* Kelly Havner's verdict because she failed to meet this new standard. In particular, in its July 9, 1997 decision, the Court held:

(i) The trial court must "independently evaluate[ ]" an expert's "underlying data" in "determining if the [expert's] opinion itself is reliable." (Op. at 12);

(ii) The *Robinson* factors are relevant to a no evidence review of scientific evidence. (Op. at 15);

(iii) "In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue [creates] an inference that because the risk is demonstrably greater in the population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance." (Op. at 17);

(iv) Prior to "properly designed and executed epidemiological studies" being deemed "legally sufficient," the party offering such studies as evidence must demonstrate a "doubling of the risk." (Op. at 23);

(v) Even upon a showing of such a doubling, "[O]ther factors must be considered." In particular, the trial court must consider the "design and execution of epidemiological stud[ies]," whether "bias" has affected the study's scientific reliability, and what the "relative risk factor" is (the Court does not conclude that a relative risk factor of 3 is required – it impliedly rejects, however, a risk factor of 2). (Op. at 25-27);

(vi) "To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. *A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study.*" (Op. at 29 (emphasis added));

(vii) "[I]f there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty." (Op. at 30); and

> (viii) A confidence level of not less than 95% as to any scientific study upon which the expert predicates his conclusions. (Op. at 37).

This is entirely new law for Texas, both in terms of procedure (a trial court reanalyzing scientific study's underlying data) and substance (determining weight to attach to a testifying expert's foundation analysis). As this Court concludes:

> In sum, we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors, affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.

(Op. at 30.)

B. When This Court Creates New Law, Historically, the Court Remands for a New Trial in the Interest of Justice

Changing the law is well-within an elected court's prerogative. Brazenly denying a litigant justice, however, is not. For this very reason, at least until now, the Court itself has promulgated – and enforced – Rule 180 of the Texas Rules of Appellate Procedure. Rule 180 provides:

> In each cause, the Supreme Court shall either affirm the judgment of the court of appeals, or reverse and render such judgment as the court

> of appeals should have rendered, or remand the cause to the court of appeals, or reverse the judgment and remand the cause to the trial court, *if it shall appear that the justice of the cause demands another trial.*

T.R.A.P. 180 (emphasis added).

Rule 180 is not some arcane, appellate practice loophole, occasionally invoked by desperate litigants. It is what this Court has recognized as the linchpin of the judicial process – the Court sits to do justice. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1991). In *Murray*, this Court modified its holding in *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987). *Murray*, 800 S.W.2d at 827, 830. Writing for the Court, Justice Gonzalez observed, "It is reasonable to assume that Murray, relying on *Arnold*, concluded that her cause of action accrued on the date SJA admitted its denial was unwarranted. . . . Our decision today, however, modifies *Arnold* so that limitations on Murray's good faith claim commenced on the day SJA denied coverage. . . . Since we have modified the law, we will remand this case in the interest of justice to the trial court."[5] 800 S.W.2d at 830; *see also Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 433 (Tex. 1984) (op. on reh'g) (remanding because "the new theory or rule required new and different evidence"), and *L.M.B. Corp. v. Gurecky*,

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[5] Though Justice Gonzalez wrote a separate concurrence with the Court's decision here, he made no whisper to Kelly Havner of justice and her rights, even though when she was a fetus – human beings about whom Justice Gonzalez has expressed concern in the past with great eloquence – Merrell Dow shaped her hand, and not God.

501 S.W.2d 300, 303 (Tex. 1973) ("these changes in the trial practice justify this court's remand of this cause . . . in the interest of justice").

In *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996), Chief Justice Phillips likewise wrote, "Where it appears from the record that the losing party may be able to recover under some alternative factual or legal theory not pursued at the first trial, we have frequently remanded in the interest of justice." *Id.* at 616 (dissenting); *see also Casso v. Brand*, 776 S.W.2d 551, 565-66 (Tex. 1989) (Phillips, C.J.) (Justice Phillips providing majority opinion and then, given that the case overruled existing law and created new law, dissenting on court's failure to remand under Rule 180), and *Brown v. RepublicBank First Nat'l Midland*, 766 S.W.2d 203, 208 (Tex. 1988) (Phillips, C.J., dissenting) ("Because this duty to mitigate represents a change in the law, the Bank had no reason at trial to rebut Brown's evidence regarding mitigation. I would therefore reverse the judgment of the court of appeals and, in the interest of justice, remand the cause to the trial court for new trial.").

Indeed, this Court has remanded – rather than rendered – to allow a plaintiff an opportunity to prove a material fact when it decided on appeal that the evidence the plaintiff offered at trial was not appropriate. *Texas Real Estate Comm'n v. Nagle*, 767 S.W.2d 691, 695 (Tex. 1989) (op on reh'g). The Court even has remanded to allow a defendant an opportunity to show that jurisdiction under a foreign judgment was lacking, after the Court held that the plaintiff may have misunderstood the effect of a trial stipulation. *Members Mut. Ins. Co. v. Tapp*, 469 S.W.2d 792, 793 (Tex. 1971). *See also: Porras v. Craig*,

675 S.W.2d 503, 506 (Tex. 1984) (remand to allow plaintiff opportunity to pursue alternative theory of damages); *Continental Southern Lines, Inc. v. Hilland*, 528 S.W.2d 828, 830-31 (Tex. 1975) (remand to allow plaintiff opportunity to pursue alternative legal theory); *Continental Casualty Co. v. Cook*, 515 S.W.2d 261, 263 (Tex. 1974) (per curiam) (remand to allow plaintiff an opportunity to pursue an alternative theory of good cause for failing to timely file his workers' compensation claim); *Houston Fire & Casualty Co. v. Nichols*, 435 S.W.2d 140, 143 (Tex. 1968) (remand to allow insured an opportunity to prove the value of destroyed property after the Court held that the policy amount did not constitute an agreement as to value); *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 195-96 (Tex. 1966) (remand because jury may have misunderstood trial court's charge); *Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1966) (holding that remand is proper "when this Court changes the rules after the case has been tried"); *AEtna Ins. Co. v. Klein*, 325 S.W.2d 376 (Tex. 1959) (remand to allow plaintiff an opportunity to put on evidence of the policy amount in an action against his insurer even though plaintiff had not offered this evidence at first trial); and *City of San Antonio v. Pigeonhole Parking of Tex.*, 311 S.W.2d 218, 223 (Tex. 1958) (remand to allow plaintiff an opportunity to prove that ordinance was unconstitutional as applied after the Court held that the ordinance was not facially unconstitutional).

Stated flatly, this Court's decision creates new law. Kelly Havner had no way of shaping her case around, much less putting forth evidence under, a law conceived five years after her verdict. Justice requires that the Court remand this cause for a new trial, otherwise this remains

a vagrant result, an opinion with no visible means of support.

C. A New Trial Here Serves the Interests of Justice Because, Had Respondents Known What the Law Was Going to Be, They Could Have Adduced Such Evidence.

Had Kelly Havner known of the stringent requirements that the Court now imposes for cases involving scientific evidence, had she known that the Court's clear statement in *Robinson* that *Duff v. Yelin* was still the law was, in fact, not true, Kelly Havner would have put on a different case. For Kelly Havner has the evidence necessary to meet this Court's new requirements. For example, Respondents could have asked Dr. Glasser, regarding the Jick data, about the confidence level and whether it contained 1.0. Respondents could have asked Dr. Swan what confidence level she used in obtaining the relative risk of 13 regarding the unpublished study of the Jick data. They could have asked here, further, what significance level was used to obtain the 2.8 relative risk result of her analysis of the Codero study published in the *Journal of Society of Epidemiological Research* (another study the Court chooses to ignore).

Respondents also could have supported their claim of doubling – had they known five years down the road, it would carry the day and be the standard – with Merrell Dow's own admission from the 1982 *Physician's Desk Reference*, which provides:

> The design of the cohort studies was generally adequate to have detected a small increase (less

> than a doubling) in the overall malformation rate, if it existed, but was *not sufficient to rule out a doubling* of a specific malformation type, for example, one per one thousand or two per one thousand.

Likewise, if granted a new trial, Respondents will put on evidence that the much-vaunted, "30 studies" upon which Merrell Dow has relied all these years – those touted, peer-reviewed studies – in fact were the product of biased, "scientific" study. This is the same evidence as that presented in *Blum v. Merrell Dow Pharmaceuticals, Inc.*, Cause No. 1027 (Philadelphia Court of Common Pleas Dec. 13, 1996) (*"Blum"*).[6]

In *Blum*, another successful Bendectin case, the plaintiffs brought to the attention of the court and jury evidence of how Merrell Dow has corrupted the very peer-review process it has demanded as a predicate for admissibility, all these years. For example, among the 30 studies, is the work of Dr. Smithells. After *British Medical Journal*, *Lancet*, and the *New England Medical Journal* each rejected Dr. Smithells' study, *Teratology* accepted it; Dr. Brent, one of Merrell Dow's testifying experts, owns *Teratology*. Dr. Smithell wrote Dr. Brent, telling him:

> [M]uch clearly depends on the value of this publication to Merrell Dow National Labs. If it may save the company large sums of money, large sums in the California court (which is rather what I thought when we undertook this study), they may feel magnaminous. If with the

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[6] Respondents attach a copy of *Blum* as "Exhibit 4."

> passage of time, the study is of no great significance, I can only regard the figure you suggest as generous and welcome.

(Exhibit 5 at 32-33.) Respondents will put forth the evidence that a Dr. Roll, in Germany, writing for the German Official Health Agency, published in the German literature, his conclusion that, "Doxylamine has proven itself in the present case to be teratogenic in Wistar rats bred by the Federal Health Agency." (*Id.* at 33.) Dr. Newburne, a Merrell Dow Vice-President, upon hearing of these findings, hired a Professor Tuchman-Duplessis as a consultant to 'liase' with Dr. Roll. Shortly thereafter, Dr. Roll completed a second study, which did not use Wistar rats, did not examine skeletons, but did use rats whose natural incidence of diaphragmatic hernia was so high that it masked any increased defects by Bendectin. This second study, of course, failed to confirm the first study. (*Id.* at 33-34.)

Regarding the study of Dr. Hendrickx, a peer-reviewed, published researcher at the University of California at Davis, Respondents will demonstrate how, after his study found a statistically significant increase in heart defects in Bendectin-treated monkeys, he wrote Dr. Newburne offering to sell his services: "I also indicated that we would be willing to discuss or modify any part of the proposal with you in order to meet a common objective." Thereafter, Merrell Dow funded Dr. Hendrickx' work in excess of $300,000.00. Dr. Hendrickx' second study, like that of Dr. Roll's, failed to confirm his first. (*Id.* at 35.)

This is a just a sampling of the scientific scholars upon whose work Merrell Dow relies. Indeed, Dr. Brent,

upon whom both Merrell Dow and this Court rely, submits drafts of his articles to Merrell Dow attorneys for their suggestions and their blessings – prior to sending them to the *New England Journal of Medicine*. Merrell Dow's attorneys even told Dr. Brent, in one instance at least, what information to include to counter Mr. Barry Nace's arguments at trial, Mr. Nace being one of the two attorneys who argued this case before the Court. In short, Merrell Dow intentionally and fraudulently poisoned these touted, peer-reviewed studies and then held them up to this Court as evidence that they did not poison Kelly Havner. This Court's new standard should allow, at the very least, for this evidence to be heard.

Given that the Court now requires the trial court to consider the underyling data of an expert's opinions, with a particular eye towards issues of bias, the type of evidence described above is critical. Prior to the Court's decision, it was useful but not necessary.

VI.

PRAYER FOR RELIEF

To Kelly Havner, the most painful irony is the loss of justice for all those who, in the future, hurt by the politically powerful, will be turned away from the courtrooms of Texas by defendants and judges brandishing an opinion that undeservedly carries her name. In an attempt to find a conduit for its "reform," this Court takes the magic of a blue-eyed, soft-spoken, very smart young woman, Kelly Havner, and forever condemns her to be the title of an opinion that symbolizes all that has withered in the legal profession of Texas. What should always be an

earnest search for truth and love by lawyers who ask twelve ordinary people to bring their common sense and reasoning to the process, has now been redesigned by this Court. Its opinion creates neither respect nor deference, from either side of the bar; rather, it confirms a clear and resigned sense of the futility in which this new day dawns.

Respectfully submitted,

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By: /s/ Robert C. Hilliard

ATTORNEYS FOR RESPONDENTS,
ERNEST and MARILYN HAVNER,
on Behalf of Their
Minor Child, KELLY HAVNER

X.

CERTIFICATE OF SERVICE

Pursuant to Rule 190, Texas Rules of Appellate Procedure, I certify that I served a true and correct copy of this document by regular mail, on all counsel of record, as identified below, along with a copy of trial court's final judgment[7], on this the 24th day of July, 1997.

/s/ Robert C. Hilliard

VIA UNITED STATES MAIL:

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[7] Respondents attach a copy of the trial court's judgment as "Exhibit 5."

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Merrell Dow v Havner

"Are you ready?" asked my lawyer as we walked out of the Four Seasons to the Texas Supreme Court. After nine years of waiting, hoping, and wondering, we were going to the Texas Supreme Court. When I was five, my parents had started the process of a lawsuit against Merrell Dow Pharmaceuticals for producing the drug Bendectin, which supposedly stopped the growth of my right hand. No one had expected that my case would get as far as the Supreme Court, so we weren't expecting to win.

I was only eight in 1991 when the trial began, so I don't remember much. It had been a long trial, but not even close to the O.J. Simpson case. The jury awarded me over thirty million dollars. We had two lawyers, named Barry Nace and Bob Hilliard. They were complete contrasts. Barry was big in built, with thinning gray hair, while Bob was tall and young. Barry believed that scientific facts were the way to win. Bob believed that you must, "Speak from the heart." Barry was nervous, like a caged tiger waiting to make his next move. Bob was laid back and calm. Despite their differences, put together they were hard to beat (I can say this, because we won our trial).

Bob had asked us to go to the Texas Supreme Court so the judges could see me in person and not just a name on a legal document; however, my mother and I had plans to go anyway. We were the first argument of the day and had to be there early so our lawyers gave us a room at the Four Seasons Hotel. The night before the trial, we had dinner with the lawyers. I realized then that my case was very important. Merrell Dow v Havner was only the second environmental case to reach the Texas Supreme Court. The first case's verdict had been highly debated, so mine will frequently be quoted.

On March 19, 1996, at 7:30 a.m., we walked into the Supreme Court building. Barry, by then a nervous wreck, went straight to the law library to study. The people from Court T.V. were there with cameras. Upon learning this, I ran into the bathroom in a panic about my hair and stayed there for the next thirty minutes. At 8:15 the courtroom was opened. I sat in the front row beside my dad and in front of my mother and cousin. The courtroom had pink marble with a long oak table at the front of the room. This was where the nine Supreme Court Justices would sit. Their seats were black leather swivel chairs. I thought the chairs were unusual because I always imagined a big, dark wooden chair for a judge. I was not nervous, but I hoped that everything would go well. When I looked at my father, I noticed that he was on the verge of tears. My thoughts weren't on the trial as much as trying to absorb everything at once. The courtroom was soon packed, and the assistants had to bring out extra chairs. Each side would have twenty-five minutes to present their case. The judges came in, and so began "Round 1."

Merrell Dow went first. They could split up their time before and after my lawyers spoke. Their lawyer was a man I had never seen before, named Hill. I later found out that he was once a judge. He was not at the original trial and knew little about the case. Only three different judges asked questions. The room was tense and uptight. This atmosphere was created by Mr. Hill's way of debating. The minute Bob got up there, the room was relaxed, and more judges asked questions. This put him on the defensive, which I knew was not what he wanted. Barry talked the last ten minutes of our twenty-five. Despite his nervousness, he kept the room relaxed. He seemed to be a father lecturing his son that might have been mistaken. He was not exactly saying the judges questions were wrong, but he showed them he was right with patience. Barry was amazingly convincing when he talked about teratology and epidemiology.

There were only two women on the Court. The Court was relatively young, with only two totally grey-haired men. One of the women was fierce in asking her questions. Ironically, next to her was a judge in a wheelchair who appeared nice when he asked his questions. He was the only one who looked our way.

Afterwards all of our lawyers seemed optimistic, but the most optimistic of all was strangely enough, Barry. He said that even if we got a retrial it should be considered a victory. We do not know what the verdict will be. I only hope that the right thing is done, and justice will prevail.

/s/ Kelly Havner

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER & MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD
KELLY HAVNER,

Respondents,

RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER

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ATTORNEYS FOR RESPONDENTS ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD, KELLY HAVNER

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER & MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER,

Respondents,

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER

TO THE SUPREME COURT OF TEXAS:

Respondents Ernest Havner and Marilyn Havner, on behalf of their minor child Kelly Havner, under the authority of the United States and Texas Constitutions, Tex.R.Civ.P. 18b, Tex.R.App.P. 15 and 15a, file this motion to recuse Justice James A. Baker from this cause.

1. Respondents ask that Justice Baker be recused from further participating in or voting on this case for the following reasons. On March 26, 1996, only seven days

after oral argument and prior to this Court issuing its opinion, Justice Baker's campaign mailed-out a funds solicitation letter to lawyers across the State. The letter identified Justice Baker's race as being the "toughest – and the most critical" of all the Republicans running for the Supreme Court. Merrell Dow's lawyer, John Hill, fresh from arguing Merrell's case to this Court, signed Justice Baker's request for money. A copy of the letter (redacted as to recipient) is attached as Exhibit 1. The objective facts in support of this motion are that John Hill stood at the podium before Justice Baker, and the rest of this Honorable Court, and firmly insisted on a reversal of the 13th Court of Appeal's affirmation of Kelly Havner's verdict. Within a week, Mr. Hill signed his name to a letter sent to Texas lawyers seeking to collect money to be used to ensure Justice Baker continues to sit on this Court. John Hill's letter, mailed out on Justice Baker's campaign stationery, causes Justice Baker's impartiality to be reasonably questioned in this proceeding. Consequently, under the clear reading of the rules, Justice Baker "shall disqualify or recuse himself." Tex.R.App.P. 15a and Tex.R.Civ.P.18b(2)(a).

2. Kelly Havner now faces an uncomfortable dilemma, one she should never have had to worry about: basic fairness. She now must ask this Court to spend time evaluating the effects of political conduct as it may relate to her case. She makes this request with much caution and deference. It simply cannot be ignored and there is little question that John Hill's letter puts Justice Baker's impartiality in issue. First, obviously Mr. Hill wants Justice Baker to vote in Merrell's favor in this case as it will save his client approximately Eight Million Dollars

($8,000,000.00). Second, and just as obviously, Justice Baker wants to be re-elected and needs money to assist in his endeavor. John Hill is publicly spear-heading Justice Baker's efforts to build a war chest. Mr. Hill, the former Chief Justice of this Court, is using his name in hopes of peddling influence on behalf of Justice Baker. Justice Baker is relying on Mr. Hill to convince lawyers from around the state to "Send Justice James A. Baker your contribution *today*." This is completely different than when Justice Baker's campaign accepted $5,000.00 on December 27, 1995 from Liddell, Sapp, Zivley, Hill & LaBoon's (Mr. Hill is a named partner in Liddell, Sapp, Zivley, Hill & LaBoon) PAC, or when a single lawyer sends a campaign contribution to his Supreme Court candidate of choice. The focus of this motion is a highly organized fund raising effort which must depend and rely on John Hill's permitting the use of his name to insure large sums of contribution money will go to Justice Baker.

3. Justice Baker may not allow John Hill's leverage to sway him in any way. In fact, Respondent's true hope and belief is that Justice Baker, should he remain on this case, would vote fairly and in a way consistent with his own independent sense of learning and experience. However, this is not the issue. The issue is whether Justice Baker's impartiality is now reasonably in question in this proceeding as a result of his campaign's choice in selecting Merrell's attorney, the lawyer of a pending case, to author a written solicitation for money; money which will go directly to Justice Baker's re-election efforts. Justice Baker is currently considering a case that John Hill argued for Merrell; a case which will save Mr. Hill's

clients millions of dollars should Justice Baker and a majority of this Court follow Mr. Hill's direction. A case that will be tremendously significant in all future litigation involving experts. There can be no serious debate that does not lead to the reasoned conclusion that Justice Baker must recuse himself from voting or participating any further in this matter.

4. Merrell Dow's position as presented by John Hill in this case is that a Judge rather than a jury should decide the weight and credibility of expert testimony. This Court now has an example of the dangers created when elected officials, who have to depend on the financial kindness and political influence of the lawyers who appear in front of them, begin to weigh matters meant to be decided in the jury box. One day, an elected State District Judge, facing the same dilemma as Justice Baker, may have to make a subjective decision regarding an expert. Perhaps the lawyer asking the Judge to rule the expert's testimony inadmissible will have also spearheaded that Judge's fund collecting efforts. Judges and Legislators are necessarily exposed to temptations of money, fame, and power to induce them to disregard justice and sell the rights, and violate the liberties of the people. Jurors, on the other hand, are exposed to none of these temptations. A jury, therefore, ensures the first and indispensable requisite in a judicial tribunal, integrity. A level judicial playing field for both sides is fundamental to the notion of non-partisan fairness. Should Justice Baker remain a sitting member of the Court deciding this case, it does damage to the respected reputation of the man himself, to the Court and to the process of Justice.

5. Respondents' counsel, Robert C. Hilliard, first learned of the mail-out on April 8, 1996. This motion was immediately prepared and mailed to this Honorable Court on April 9, 1996. Respondents make this objection at the first opportunity; therefore, good cause exists under Tex.R.App.P. 15(a) and the Court should permit this objection and motion to be filed.

6. For these reasons, Respondents Ernest Havner and Marilyn Havner, on behalf of their minor child Kelly Havner ask that Justice James A. Baker recuse himself from this case. If Justice Baker refuses, Respondents request that the motion be referred to the Court en banc, without Justice Baker, for a ruling.

> *"Justice Baker is also an integral member of the Court's continued movement for reform. He is committed to fully and permanently restoring the integrity of the Court . . . "*
>
> *John L. Hill, Jr.*
>
> *Campaign to*
>
> *Elect Justice James A. Baker*
>
> *For Texas Supreme Court*
>
> *March 26, 1996*

Respectfully Submitted,

HILLIARD & MUÑOZ, P.L.L.C.

/s/ Robert C. Hilliard
Robert C. Hilliard
State Bar No. 09677700
719 South Shoreline, Suite 600
Corpus Christi, Texas 78401
(512) 882-1612
FAX (512) 882-3015

EXHIBIT 1

Elect Justice
James A. Baker
(logo) For Texas Supreme Court

March 26, 1996

Dear

Of all the Republicans running for Supreme Court Justice, James Baker's race for Place 2 will be the toughest – and the most critical.

He's being challenged by Democrat Gene Kelley, who we're concerned will benefit from his well-known name. Texans need only remember when Don Yarborough was elected to the Supreme Court because voters mistook him for former United States Senator Ralph W. Yarborough.

Our concern has heightened since the release of the results of recent State and House Bar Association polls. In the 1996 State Bar Association poll, Baker received 9,377 or 81% of the votes cast – the highest percentage received by any of the four incumbent Supreme Court justices on this year's ballot. Kelley received the remaining 19%.

In the 1996 Houston Bar Poll, Baker was rated "qualified" or "well qualified" by 93% of his total, or 1,115 out of 1,199 votes. By contrast, Kelley received more "not qualified" votes – 877 or 91% of his total – than any other candidate for the Supreme Court.

Justice Baker is clearly and widely thought to be the more qualified candidate by the legal community, but we need your help to ensure Gene Kelley's well-known name

doesn't overcome Justice Baker's superior qualifications and abilities.

Will you please donate $500 or $250 to Justice James Baker's campaign today? Your contribution is critical to helping us inform Texans of the clear differences between the two candidates. Justice Baker is the only qualified candidate running for Place 2.

James Baker was appointed by Governor George W. Bush to the state's highest court in October, 1995, to fill the vacancy created by the resignation of Justice Bob Gammage. He has 10 years of experience as a Dallas Court of Appeals justice, and 30 years of experience practicing law.

Justice Baker is also an integral member of the Court's continued movement for reform. He is committed to fully and permanently restoring the integrity of the Court, and ensuring its decisions are honest and fair.

Gene Kelley, on the other hand, is rated unqualified by the overwhelming majority of the legal community.

We must get our message out to the voters. We must promote James Baker's qualifications, and the significance this election will have on preserving the Court's integrity. Television ads will be a necessity.

Please, help us support the *only* qualified candidate for Supreme Court Justice, Place 2. Send Justice James A. Baker your contribution *today*.

This race is critical. Although there are unequivocal differences between the two candidates, it will most definitely be the most difficult to win. Gene Kelley's high name recognition poses a significant threat to James

Baker and to Republicans, unless we can get our message out to the voters.

Thank you for your consideration.

Sincerely,

/s/ Tom Luce
Tom Luce

/s/ John L. Hill, Jr.
John L. Hill, Jr.

P.S. James Baker's race for Place 2 on the Texas Supreme Court will be the most difficult of our Republican candidates. Why? Because his opponent is Gene Kelley, whose well-known name can be enough to get him elected unless we educate the voters. Kelley is rated unqualified by the majority of our state's lawyers – join us in supporting the only candidate for Place 2, Justice James Baker. Please help today.

[Campaign Flyer Omitted In Printing]

May we please have the following information?

The Justice James A. Baker Campaign is required by the new Texas election law to collect the following from you:

_____

Name (please print)

_____

Occupation Job Title

_____

Employer
Is this a law firm? [ ] Yes [ ] No

_____

Home Work

_____

Spouse

_____

Spouse's Occupation Job Title

_____

Spouse's Employer
Is this a law firm? [ ] Yes [ ] No

If contributor is a minor, please check here and complete the information below.

Parent or Guardian's Name(s)

_____

Parent or Guardian's Occupation(s)

_____

Parent or Guardian's Employer(s)

Is this a law firm? [ ] Yes [ ] No

Under the new law affiliation with a law firm includes any partner, associate, shareholder or employee and any person designated "of counsel" to the firm or "of the firm." A contribution by the spouse or child of an individual is considered to be a contribution by the individual. The $30,000 contribution limit placed on all contributions from members of a firm includes contributions by their spouses and children and the law firm's general-purpose political committee.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF NUECES §

On this day, Robert C. Hilliard appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said he read **RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER**, the facts in it are within his personal knowledge, and are true and correct.

/s/ Robert C. Hilliard
Robert C. Hilliard

SWORN TO AND SUBSCRIBED before me by Robert C. Hilliard on the 9th day of April, 1996.

(SEAL) NANCY WEBSTER
MY COMMISSION EXPIRES
APRIL 1, 1998

/s/ Nancy Webster
Notary Public in and
for the State
of Texas

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was sent to all counsel of record listed below by fax and certified mail on this the 9th day of April, 1996.

/s/ Robert C. Hilliard
Robert C. Hilliard

FAX NO. 713/223-3717
CM/RRR Z 278 687 744

LIDDELL, SAPP, ZIVLEY, HILL & LABOON, L.L.P.
John L. Hill, Jr.
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MEHAFFY & WEBER
Gene M. Williams
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APPENDIX C
IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON MOTION FOR REHEARING

ORDER

The motion for rehearing filed on behalf of the Havners is overruled. However, the tenor of that motion requires that we address the conduct of Respondent's counsel.

This is not the first time in this case that the Havner's counsel have engaged in less than exemplary conduct. Following the decision of the original panel of the court of appeals, which had reversed the judgment of the trial court and rendered judgment that the Havners take nothing, Robert C. Hilliard filed two briefs with the court of appeals which that court, sitting en banc, found to be "insulting, disrespectful, and unprofessional." *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 907 S.W.2d 565, 566 (Tex. App. – Corpus Christi 1994) (en banc) (per curiam). The court of appeals further concluded that the briefs "evidence[d] a violation of the Texas Disciplinary Rules

of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness." *Id.* The court of appeals accordingly forwarded copies of those briefs to the Office of General Counsel of the State Bar of Texas pursuant to Texas Code of Judicial Conduct, Canon 3(D)(2). *Id.*

In assessing the appropriate response to the motion for rehearing that has now been filed by Hilliard and his co-counsel in this Court, we agree with another of our courts of appeals who recently found it necessary to address attacks on the integrity of that court:

> A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.

In re Maloney, 949 S.W.2d 385, 388 (Tex. App. – San Antonio 1997, no writ) (en banc) (per curiam); *see also Johnson v. Johnson*, 948 S.W.2d 835, 840-41 (Tex. App. – San Antonio 1997, writ requested)[1] (sanctioning counsel for disparaging remarks about the trial court and forwarding the court of appeals' opinion to the Office of General counsel, concluding that a substantial question had been raised about counsel's honesty, trustworthiness, or fitness as a lawyer).

---

[1] An application for writ of error is pending in this Court, and we express no opinion on the merits of that appeal.

Court's possess inherent power to discipline an attorney's behavior. " 'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence.' " *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (further observing that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it) (quoting *Anderson v. Dunn*, 19 U.S. (1 Wheat.) 204, 227 (1821)); *see also Public Util. Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988); *Johnson*, 948 S.W.2d at 840-41.

The Disciplinary Rules governing the conduct of a lawyer provide:

> A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 4, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

Rule 8.02(a) of the Disciplinary Rules specifically states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth of falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Id. Rule 8.02(a).

The Legislature has also provided a mechanism for courts to sanction counsel who file pleadings presented for an improper purpose or to harass. TEX. CIV. PRAC. & REM. CODE §§ 10.001-10.005. In addition, one of the lawyers for the Havners, Barry Nace, is a non-resident attorney. His appearance in Texas courts is subject to the Rules Governing Admission to the Bar, including Rule XIX.

The specific portions of the "Respondents' Motion for Rehearing" filed in this Court that raise particular concerns are the "Statement of the Case for Rehearing" (pages 1-5), the "Brief of the Argument" (pages 8, 14, and 16), and the "Prayer for Relief" (pages 19-20). Counsel for Respondents Robert C. Hilliard of the firm of Hilliard & Muñoz, Barry J. Nace of the firm of Paulson, Nace, Norwind & Sellinger, and Rebecca E. Hamilton of the firm of White, White & Hamilton, P.C., are hereby afforded the opportunity to respond as to why the Court should not

1) refer each of them to the appropriate disciplinary authorities;

2) prohibit attorney Nace from practicing in Texas courts; and

3) impose monetary penalties as sanctions.

Any response must be filed in this Court by 5:00 p.m., Monday, November 24, 1997.

Done at the City of Austin, this 13th day of November, 1997.

JOHN T. ADAMS, CLERK
SUPREME COURT OF TEXAS

By /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

(JUSTICE BAKER not sitting)

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

MOTION FOR CLARIFICATION OF ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

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WHITE, WHITE
& HAMILTON, P.C.
118 East Rusk Street
Rockwall, Texas 75087

COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

MOTION FOR CLARIFICATION OF ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

COME NOW Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, counsel for Respondents in the above-styled and numbered matter and serve and file this, their Motion for Clarification of Issues Raised in Court Order Dated November 13, 1997 ("Motion for Clarification"), and, in support thereof, respectfully show unto the Court the following:

1.0 ***Factual/Procedural Background.***

On July 24, 1997, Respondents' counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, filed the Motion for Rehearing at issue here. On November 13,

1997, the Court issued its Order affording Respondents' counsel the opportunity to "respond as to why the Court should not 1) refer each of them to the appropriate disciplinary authorities; 2) prohibit attorney Nace from practicing in Texas courts; and 3) impose monetary penalties as sanctions." (Order at 4.) The Court since has extended the time for response to December 4, 1997. Should the Court grant this Motion for Clarification, Messrs. Hilliard and Nace and Ms. Hamilton request a further, brief extension of time to respond if any new issues are presented by the Court in its clarification.

2.0 ***Motion.***

The Court's November 13th Order raises substantial issues under the United States Constitution and Texas Constitution. *See* U.S. Const. amend. I ("Freedom of speech" and right "to petition the Government for a redress of grievances") and Tex. Const. art. I, § 8, 13, and 19 ("freedom of speech," "open courts," and "due course of law.").

In particular, the impact of the Order on the First Amendment rights of Mr. Hilliard, Mr. Nace, Ms. Hamilton and, more importantly, the Havner family is real and substantial. The Court simply states that it finds fault with the "tenor" of the Motion for Rehearing. (Order at 1.) The Court identifies, however, 10 of the 20 substantive pages of the Motion for Rehearing as "rais[ing] particular concerns." Clearly, the Court finds fault with particular language appearing in the Motion for Rehearing, yet has not delineated the language it finds troubling with any specificity.

Mr. Nace contributed not one word to any portion of the Motion for Rehearing. Further, of the pages the Court enumerates as problematic, Ms. Hamilton contributed only portions of pages 8, 14, and 16.

Given these facts, the Court's notice falls short of the specificity required by Texas Civil Practice & Remedies Code §§ 10.002(b) and 10.003, lacks the specificity required by principles of procedural due process under the U.S. Const. amend. V and XIV, § 1, and runs afoul of Respondents' and their counsels' rights under the Texas Constitution's due course of law and open courts provisions. Tex. Const. art. I, §§ 8, 13, and 19. In particular, the Texas Civil Practice & Remedy Code, the U.S. Constitution, and the Texas Constitution all require that "notice" under these circumstances describe the "specific" conduct offensive to the Court. Fundamental notions of fairness require no less. An objection to "tenor" of rhetoric in 10 of 20 pages of a brief is not sufficiently specific to apprise an attorney of conduct warranting monetary sanctions or referral to a grievance committee, much less the wholesale barring of him from practice.

When a Court sanctions and/or refers attorneys to a grievance committee because it finds words on pieces of paper to be of an objectionable "tenor" – and not because of distracting or divisive conduct in a court room – procedural due process and due course of law demand that such a Court identify with specificity the language of which it seeks to condemn the attorney. This conclusion is particularly true when, as here, the only avenue of appeal is to the United States Supreme Court.

The chilling effect on the exercise of First Amendment freedoms is of particular concern here, because Mr. Nace wrote no part of the Motion for Rehearing and Ms. Hamilton wrote only portions of pages 8, 14, and 16 – none of which, as far as she can ascertain – rise beyond the normal level of rhetoric normally employed by appellate practitioners, not to mention opinions of this very Court.

Procedural due process, due course of law, and Texans' rights to open courts strongly favor this Court clarifying its Order and granting Respondents' counsel additional time to respond to any clarifications so issued. U.S. Const. V and XIV, § 1, and Tex. Const. art. I, § 8, 13, and 19. Counsel for Respondents, therefore, request that this Court clarify the Order so that they may prepare an adequate response and defense to the allegations contained therein.

Respectfully submitted,

WHITE, WHITE
& HAMILTON, P.C.

Original Signed by
TODD W. WHITE
Todd W. White
State Bar No. 21332700
Rebecca E. Hamilton
State Bar No. 08837050

118 East Rusk Street
Rockwall, Texas 75087
Telephone: 972/771-8011
Telecopy: 972/722-3922

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States mail on this the 20th day of November, 1997.

Original Signed by
TODD W. WHITE
Todd W. White

VIA UNITED STATES MAIL
Barry J. Nace
PAULSON, NACE
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VIA UNITED STATES MAIL
Gerald L. Spence
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VIA UNITED STATES MAIL
William J. Dorsaneo, III
SMU SCHOOL OF LAW
P.O. Box 750116
Dallas, Texas 75275-0116

APPENDIX E

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF
THEIR MINOR CHILD, KELLY HAVNER,
RESPONDENTS.

On Motion for Rehearing

MOTION FOR HEARING OF ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

Robert C. Hilliard
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COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF
THEIR MINOR CHILD, KELLY HAVNER,
RESPONDENTS.

On Motion for Rehearing

MOTION FOR HEARING OF ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

COME NOW Barry J. Nace and Rebecca E. Hamilton, counsel for Respondents in the above-styled and numbered matter and serve and file this, their Motion for Hearing of Issues Raised in Court Order Dated November 13, 1997 ("Motion for Hearing"), and, in support thereof, respectfully show unto the Court the following:

1.0 Factual/Procedural Background.

On July 24, 1997, Respondents' counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, filed the

Motion for Rehearing at issue here. On November 13, 1997, the Court issued its Order affording Respondents' counsel the opportunity to "respond as to why the Court should not 1) refer each of them to the appropriate disciplinary authorities; 2) prohibit attorney Nace from practicing in Texas courts; and 3) impose monetary penalties as sanctions." (Order at 4.) The Order set a response date of November 24, 1997.

On November 14, 1997, Mr. Hilliard wrote the Court in letter form, requesting a hearing and an extension of time to respond to the Order. On November 17, 1997, Deputy Clerk, Elizabeth Saunders, informed Mr. Hilliard that the Court would extend his time for response until December 4, 1997.

Although Mr. Hilliard's letter referenced only his desire for an extension and a hearing, in an abundance of caution (and hope) Ms. Hamilton called Ms. Saunders that afternoon and asked whether the extension of time would apply to herself and Mr. Nace, as well (Mr. Nace being in trial in Virginia and having asked Ms. Hamilton to so ascertain). Ms. Saunders advised that the extension of time would extend to Ms. Hamilton and Mr. Nace, as well. Ms. Hamilton and Mr. Nace did not ask Ms. Saunders whether the denial of Mr. Hilliard's request for a hearing applied to them.

In moving now for a hearing, neither Ms. Hamilton nor Mr. Nace seek to have the Court burden itself by what it considers the re-addressing of matters already decided. Rather, counsel desire only to preserve an explicit record for themselves on the issue of requesting a

hearing. By the same token, however, neither Ms. Hamilton nor Mr. Nace file this Motion with the belief that the Court will deny it. Ms. Hamilton and Mr. Nace simply seek at this time that the Court grant them the opportunity for a hearing before the Court as to the important issues raised by the Court's November 13th Order.

2.0 Motion.

The Court's November 13th Order raises substantial issues under the United States Constitution and Texas Constitution. *See* U.S. Const. amend. I ("freedom of speech" and right "to petition the Government for a redress of grievances") and Tex. Const. art. I, § 8, 13, and 19 ("freedom of speech," "open courts," and "due course of law.").

In particular, the impact of the Order on the First Amendment rights of Mr. Hilliard, Mr. Nace, and Ms. Hamilton and, more importantly, the Havner family is real and substantial. Likewise, the precedent of an order sanctioning and/or referring to the grievance committee of Respondents' counsel (and, likewise, the barring from practice in the State of Texas of Mr. Nace) because of the "tenor" of their rhetoric and zealous representation will have a profoundly chilling effect on the exercise of freedom of speech by attorneys and others concerned with the judicial process throughout the State of Texas. (Order at 1.) The chilling effect is of particular concern here because Mr. Nace wrote no part of the Motion for Rehearing and Ms. Hamilton write portions of pages 8, 14, and 16 – none of which, as far as she can ascertain – rise

beyond the normal level of rhetoric employed by appellate practitioners.

Procedural due process, due course of law, and Texans' rights to open courts strongly favor this Court holding a hearing on the issues raised by the Order. U.S. Const. V and XIV, § 1, and Tex. Const. art. I, § 8, 13, and 19. The fact that review of this Court's decision in connection with the Order is limited to appeal to the United States Supreme Court supports further the conclusion that a hearing on these issues would be appropriate, healthy, and necessary.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

Original Signed By
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Rebecca E. Hamilton
State Bar No. 08837050

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ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States mail on this the 20th day of November, 1997.

Original Signed By
TODD W. WHITE

Todd W. White

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VIA UNITED STATES MAIL
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SMU SCHOOL OF LAW
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Dallas, Texas 75275-0116

APPENDIX F

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 25, 1997

Hon. John L. Hill, Jr.
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Mr. Guy H. Allison
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78403-3080

Mr. Barry J. Nace
Paulson Nace Norwind &
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Ms. Rebecca E. Hamilton
White White & Hamilton
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Rockwall, TX 75807

Mr. Kevin W. Grillo
Hilliard & Grillo
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Corpus Christi, TX 78401

Mr. Robert C. Hilliard
Hilliard & Munoz
719 S. Shoreline, Suite 600
Corpus Christi, TX
78401-3548

Mr. John T. Flood
The Kleberg Law Firm
500 N. Water Street,
Suite 300
Corpus Christi, TX 78471

RE: Case Number 95-1036

Style: MERRELL DOW PHARMACEUTICALS, INC.
v.
EARNEST HAVNER and MARILYN HAVNER on behalf of their minor child KELLY HAVNER

Dear Counsel:

The motions for hearing and for clarification were overruled in the above numbered and styled cause. (Justice Baker not sitting.)

Sincerely,

John T. Adams, Clerk

by /s/ Michael C. Murphey
Michael C. Murphey, Deputy

(Seal)

THE SUPREME COURT OF TEXAS

Orders Pronounced November 25, 1997

ORDERS ON CAUSES

THE MOTIONS FOR HEARING AND FOR CLARIFICATION ARE OVERRULED IN THE FOLLOWING CAUSE:

95-1036 MERRELL DOW PHARMACEUTICALS, INC. v. EARNEST HAVNER and MARILYN HAVNER on behalf of their minor child KELLY HAVNER; from Nueces County; 13th district (13-92-00540-CV, 907 SW2D 535, 03-17-95)

motion for hearing of issues raised in court order dated

November 13, 1997, overruled

motion for clarification of issues raised in court order dated

November 13, 1997, overruled

(Justice Baker not sitting)

APPENDIX G

No. 13-92-00540-CV

IN THE
SUPREME COURT
OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

vs.

ERNEST HAVNER & MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD
KELLY HAVNER,

Respondents.

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

Individual Response of Barry J. Nace to Court Order of November 13, 1997[1]

Your Respondent initially requests an apology from this Court. The reasons follow.

Respondent Barry J. Nace received notice of the Order on November 13, 1997 when his office received telephone calls from numerous members of the news media. At the time, Mr. Nace was trying a case out of his home jurisdiction of the District of Columbia. He did not

[1] Barry J. Nace files this Individual Response to the Court's Order, but joins in the substance of the Joint Response being filed by other counsel.

know at the time what this matter was all about. Now, having read the Order, the Respondent is filled with numerous emotions: anger, sadness and disgust.

Anger exists for several reasons. As the attached affidavit (Exhibit 1) shows, the Respondent had nothing whatsoever to do with the pleading in question. This is confirmed by other documents filed in this case by Ms. Hamilton who correctly states, "Mr. Nace contributed not one word to any portion of the Motion for Rehearing". Anger prevails because this court *assumed* the Respondent had been involved notwithstanding (1) the fact that the Respondent never signed the pleading; (2) notwithstanding that at least one member of this court was aware that at the time of the filing of the pleading and for at least several days before, the Respondent was in San Diego, California, participating in a seminar on this very subject, as was a member of this Court; and (3) notwithstanding that the Respondent had at the invitation of this Court reluctantly agreed to participate in a seminar for the Texas Judiciary on this very issue. Despite all of that, this Court released its Order to the press without even having the courtesy to provide it to your Respondent first. One can only imagine the result had Respondent sent a pleading to the news media before filing it in Court. Your Respondent will address each of those points.

First, this Court did nothing to ascertain who wrote the pleading in question before releasing the Order to the news media. The Court could simply have issued an Order asking that basic question. Even a cursory view of the pleading in question would show that not only did the Respondent clearly not sign the pleading in question but that the wrong address appears under his name as

does an incorrect name of his firm. The correct address is "N" Street, N. W. – not "North Street". This appears at every instance when the address is given. That is, the address is given as "North Street, N. W.". One would hope the highest Court in the State of Texas would review pleadings when it issues Show Cause Orders closely enough to be sure of what it was doing before defaming and damaging a lawyer by innuendo! Had someone at the Court taken the time to look, the Court would have realized that the Respondent probably knows his own address. But it is clear that Respondent's signature appears nowhere on the document. Should the Court not have first ascertained under the circumstances the involvement in the pleading of each attorney? Or is this a return to "McCarthy days"? Certainly there is an air of McCarthyism about this matter as it is being conducted. This Court had even more ample reason to question the undersigned involvement as we shall see below.

Secondly, a member of this very Court was in the audience and participated in a seminar on the same issues involved in this case after the appellate decision was released and before the pleading in question was filed, as did your Respondent. That member of the Court was aware of the presence of the Respondent who also participated in the seminar and that knowledge should have at least raised some question about the undersigned's involvement. That seminar took place in San Diego, California on July 19 and your Respondent was in San Diego on July 18 thru July 25, 1997. The pleading in question was filed on July 24, 1997. Your Respondent did not even want to file a Petition for Rehearing because he was convinced that this Court – based on its opinion –

would never grant a rehearing for reasons that if expressed would obviously result in another "Show Cause Order."

Finally, in March of this year, the Respondent appeared at a Texas Judiciary Seminar on the issue of scientific evidence and the Daubert Case as part of a panel discussion. When the Respondent was first invited to speak on this matter, he had serious questions as to whether or not he should appear on a panel discussing such issues in light of the pending Havner case. The Respondent appeared, however, because counsel for Merrell Dow was appearing. The Respondent was told that was the way it was done in Texas. Therefore, your Respondent took more than a day out of his schedule at the request of the Texas Judiciary.

Your Respondent asks, what kind of court knows an attorney is attending and participating in a seminar at the very time the pleading is filed, knows an attorney has taken his time to appear at its Judicial Conference, and which can quickly ascertain the attorney clearly had not signed the pleading and yet issues a Show Cause Order to the news media before informing counsel? It is respectfully submitted that your Respondent did nothing to even suggest the kind of treatment he has received, nor should he have been subjected to the "tenor" or to the terror of the Order.

This Court by its four page Order, however, has held the Respondent up to criticism. This Court has damaged the good name of the Respondent and had the temerity to issue a Show Cause Order as to why the Respondent should not be prohibited from practicing in Texas courts.

The grief that this Court has caused the Respondent is certainly unwarranted. Does this Court not recognize that even a suggestion of a reference to the appropriate disciplinary authorities, a suggestion of prohibition from practicing in Texas courts, and a suggestion of imposition of monetary penalties as sanctions is bound to have adverse consequences upon the accused? Your Respondent is owed an apology by the Court and not simply a finding that sanctions are not merited or are not warranted against the Respondent. That would not be enough. Does this Court recognize the effect of what it has done? The monetary effect on the attorney, the effect on malpractice insurance for example? Further, it was all so unnecessary had just a modicum of consideration and thoughtfulness been given to the issue by the Court.

Moreover, were the Respondent paranoid, he would wonder whether or not there was an attempt being made to "get" at him because he is a Plaintiff's trial attorney.

However, while the Respondent had absolutely nothing to do with the preparation of or approval of the pleading in question, the Respondent is filled with a great sense of sadness that the highest Court in any jurisdiction would even contemplate taking any action against an attorney who filed such a pleading. Texas counsel has at all times tried to properly represent Kelly Havner with good reason. The bottom line is that this case was tried before a jury of twelve citizens of this state, and the case was well tried in a totally professional sense before an honorable, competent, well-respected member of the Texas Judiciary, who having listened to all of the evidence, denied the post-trial motions on the liability of the defendant and affirmed the jury's verdict. No one could

suggest intelligently that Plaintiff Kelly Havner did not produce strong expert testimony. This Court did not like that testimony.

Only a rare citizen would even be aware of the powers of the trial court to order remittitur, or order a new trial, or order judgment non obstante verdicto. Even more rare would be the citizen who would believe that an appellate court could disagree with a jury's verdict and refuse to even allow a child to get their day in court when the rules have been changed. Moreover, four out of five judges on the intermediate Appellate Court found no reason to overturn the decision in this case. They respected the jury's decision. Again, citizens of any jurisdiction would be shocked to know that fact also meant nothing in this girl's life. The jury verdict meant nothing, the trial court's decision meant nothing, the intermediate appellate court's decision meant nothing and Kelly Havner's quest and proof meant nothing. And she doesn't get a chance to prove her case under new rules.

Rare also would be the citizen of any jurisdiction who would not see the appearance of impropriety when seven days after an argument before the highest court of any state, one of the attorneys arguing the case sends a letter to other attorneys in the state printed on a Justice's campaign stationery to raise funds for the election of that Justice. What did this Court do about that? Nothing. With that background, what attorney would not be outraged at this Court's actual opinion?

For this Court to threaten the sanctions that it has threatened against the authors of the pleading in question because it did not appreciate the "tenor" of the motion

for reconsideration is simply a thin-skinned act of retaliation and a show of power. This Court in its Order cited two rules. The first deals with a demonstration of respect for the legal system and a recognition that a lawyer has the duty to challenge the rectitude of official action. The second deals with the truth or falsity or integrity of a judge.

Mr. Hilliard in zealously representing his client, Kelly Havner, as he should do, has clearly exercised his opportunity to challenge the rectitude of official action. Can he not challenge elected officials such as the members of this Court? Further, he has said nothing more than what has been expressed for some time about justice in Texas. He has noted that justice for Kelly Havner is a precursor of justice of the citizens of Texas. He has done so eloquently and for someone to suggest that he has not a sound basis for his statements would be appalling.

Experienced lawyers know that an appellate opinion can express any view of what has transpired before the case got to the Appellate Court and make it sound good. But there are boundaries and lines in the sand that should not be crossed. When that happens, it effects the respect of the citizenry for the system and that is the concern of your Respondent. No language could be too harsh for the jury tampering and appellate court tampering that appears to exist in the case of this little girl. That is, any ordinary citizen would be shocked to learn that the jury decision was tampered with, i.e. taken away, by another court. Such action requires close scrutiny and for someone to suggest otherwise is sad.

No attorney in this country has any more respect for the legal system and for the jury system than does the Respondent. But, can the Court believe that Kelly Havner, her parents, and those associated with her could possibly have respect for a legal system in which in a well tried case a jury found in their favor; four out of five judges in the intermediate court found in their favor; and yet not only is she not permitted to recover anything but she is not even given an opportunity to prove her case when the rules have been changed? While it is clearly not for a Court (this one or any other one) to decide whether or not a particular drug causes birth defects, that is exactly what this court did, regardless of the evidence. The rest of the opinion is subsumed by that fact and is thus nothing more than window dressing to try to support that opinion. This Court did not believe Bendectin causes birth defects and therefore, the jury decision had to be corrected. That, however, is not a system of law – it is a system of power. This Court has effectively stated that the jury was stupid, but this Court is smart. And then when a counsel sees such total disrespect and disregard for the jury system and the legal system and sees the effect it has on a child, and responds to it, overzealousness is unlikely to be possible. To condemn whomever wrote such a brief then is retribution for the sake of retribution, not justice. Whoever wrote the brief should not be condemned and vilified. Rather the author(s) should be looked upon as a hero(s).

This Court has taken this Respondent's good name and threatened him with sanctions without giving the slightest concern to the effect of such action nor its veracity. It is not enough to say "that is why we have

issued a show cause order." This Court should admit its error and apologize promptly to the Respondent.

Respectfully Submitted,

/s/ Barry J. Nace
Barry J. Nace, Esquire

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Response on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States mail on this 26th day of November, 1997.

/s/ Barry J. Nace
Barry J. Nace

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No. 13-92-00540-CV

IN THE
SUPREME COURT
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MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

vs.

ERNEST HAVNER & MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD
KELLY HAVNER,

Respondents.

Appealed from the Thirteenth Court of Appeals
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AFFIDAVIT

Barry J. Nace, Esquire having first been sworn according to law states as follows:

1) I did not prepare in any fashion the Pleading that is the subject of the Motion to Show Cause;

2) I did not see the Pleading that is the subject of the Order at any time prior to its filing, nor did I at any time approve of its filing;

3) I was totally unaware of the contents of the pleading that is the subject of the Order until after it was filed.

/s/ Barry J. Nace
Barry J. Nace, Esquire

District of Columbia:SS

Subscribed and sworn to before me this 26th day of November, 1997.

/s/ Melissa A. Van Vugt
Melissa A. Van Vugt
Notary Public, District of Columbia
My Commission Expires: October 14, 2002

APPENDIX H

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONDENTS' COUNSEL'S REQUEST FOR JURY TRIAL AS TO ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

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COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONDENTS' COUNSEL'S REQUEST FOR JURY TRIAL AS TO ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

COME NOW Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, counsel for Respondents in the above-styled and numbered matter (sometimes collectively "Respondents' Counsel"), and serve and file Respondents' Counsel's Request for Jury Trial as to Issues Raised in Court Order Dated November 13, 1997 ("Jury Request"), and, in support thereof, respectfully show unto the Court the following:

1.0 Factual/Procedural Background.

On July 24, 1997, Respondents' Counsel filed the Motion for Rehearing at issue here. On November 13, 1997, the Court issued its Show Cause Order affording Respondents' Counsel the Opportunity to "respond as to why the Court should not 1) refer each of them to the appropriate disciplinary authorities; 2) prohibit attorney Nace from practicing in Texas courts; and 3) impose monetary penalties as sanctions." (Order at 4.) The Show Cause Order initially reflected a response date of November 24, 1997. Later, however, the Court extended the response date to December 4, 1997.

2.0 Motion.

2.1 Because the Court Seeks to Impose Criminal Contempt Sanctions, Respondents' Counsel Are Entitled to a Jury.

The Show Cause Order reflects that the Court is offended by the "tenor" of Respondents' Counsels' motion for rehearing. (Order at 1.) *See Ex parte Chambers*, 898 S.W.2d 257, 259 ("Contempt of court is broadly defined as disobedience to or disrespect of a court by acting in opposition to its authority." (and cases cited therein)). Given that Respondents' Counsel violated no pre-existing order, the Court has accused Respondents' Counsel of "criminal contempt," as opposed to "civil contempt." *Ex parte Werblud*, 536 S.W.2d 542, 545-546 (Tex. 1976) (defining and distinguishing the concepts of "civil" v. "criminal" contempt). Accordingly, the Court seeks to issue an order of criminal – or punitive – contempt and seeks to punish Respondents' Counsel for their alleged

contempt by imposing monetary sanctions. (Order at 4.) *See, e.g., Ex parte Griffin*, 682 S.W.2d 261, 263 (Tex. 1984) (Robertson, J., concurring) ("Contempt is a 'unique' sanction.").

It is not clear whether the contempt that the Court alleges is present in the Motion for Rehearing is "constructive" or "direct," nor whether it is "petty" or "serious." *See Ex parte Werblud*, 536 S.W.2d at 545-546 (defining and distinguishing the concepts of "constructive" versus "direct" and "petty" versus "serious" contempt).[1] Because the Court has denied Respondents' Counsel's motion for clarification of the Show Cause Order, they are unable to ascertain whether the Court views the offense as "petty" or "serious."

This distinction is without significance under the circumstances, however, because in either case the law entitles Respondents' Counsel to specific notice, an evidentiary hearing, and a jury to assess all factual issues. As this Court observed in *Ex parte Bell*, "Punishment without issue or trial is so contrary to the usual and ordinary indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court is required to justify the exception; but the need for immediate penal

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[1] As to the constructive or direct contempt issue, the law appears unsettled on whether words filed in a brief on rehearing can form the basis for a direct contempt in open court. *See Craig v. Harney*, 331 U.S. 367, 377 (1947) ("If the point had been made in a petition for rehearing and reduced to lawyer's language, it would be of trifling consequence.").

vindication of the dignity of the court created [the exception]." 894 S.W.2d 119, 129 (Tex. 1995) (ellipses in original). Indeed, the United States Supreme Court recently wrote:

> We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the courts' business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the courts' authority" before the public.

Pounders v. Watson, No. 96-1383, 1977 U.S.LEXIS 4045, at *7 (June 27, 1997) (quoting *In re Oliver*, 333 U.S. 257, 275 (1948)). *See also Ex parte Werblud*, 536 S.W.2d 542, 544-46 (1976) (recognizing right to hearing), and *Ex parte O'Fiel*, 246 S.W. 664, 665 ("[T]here can be no constructive contempt of court with reference to publications reflecting on the court or the judge thereof, unless the publication is not only of a defamatory character but is untrue." (quoting with approval *Ex parte Green*, 81 S.W. 723, 725 (1904))).

In *Ex parte Sproull*, this Court expressly recognized that the law entitles an accused contemnor to a trial by jury under Sixth Amendment if the contempt offense at issue is "major." 815 S.W.2d 250 (Tex. 1991). *See also Ex parte Griffin*, 682 S.W.2d 261 (Tex. 1984) ("The Sixth Amendment to the United States Constitution guarantees the right to jury trials for serious offenses, but not petty offenses." (quoting *Muñiz v. Hoffman*, 422 U.S. 454, 475-76 (1975))), and *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex.

1983) ("[P]rocedural safeguards for contempt do not derive from the sixth amendment, but arise under traditional notions of due process."). Again, as the Court has declined to clarify the Show Cause Order, Respondents' Counsel cannot ascertain the monetary sanction at issue – and, therefore, whether the alleged offense is "petty" or "serious."

In *Ex parte Johnson*, this Court held that, "The right to be present at trial and confront witnesses is fundamental and essential to a fair trial." 654 S.W.2d 415, 421 (Tex. 1983) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). It further observed, "The right is protected under Texas law by article 1, section 10 of the Texas Constitution." *Johnson*, 654 S.W.2d at 421. While a "summary exception" does exist to this rule, it does not apply here because the conduct at issue is (i) pure speech (ii) reflected in filed papers (iii) and not uttered in open court before the Justices.

2.2 Because the Court Seeks to Impose Criminal Sanctions Based on Respondents' Counsel's Pure Speech – Filed in Documents, Not Uttered in Open Court – Respondents' Counsel Are Entitled to a Jury.

The Show Cause Order raises substantial issues under the United States Constitution and Texas Constitution. *See* U.S. Const. amends. I ("freedom of speech" and right "to petition the Government for a redress of grievances"), V, VI, and XIV, and Tex. Const. art. I, § 8, 13, and 19 ("freedom of speech," "open courts," and "due course of law.").

The impact of the Show Cause Order on the First Amendment rights of Mr. Hilliard, Mr. Nace, and Ms. Hamilton and, more importantly, the Havner family, is real and substantial. Likewise, the precedent of an order sanctioning and/or referring to the grievance committee of Respondents' Counsel (and, likewise, the barring from practice in the State of Texas of Mr. Nace) because of the "tenor" of their rhetoric and zealous representation will have a profoundly chilling effect on the exercise of freedom of speech by attorneys and others concerned with the judicial process throughout the State of Texas. (Order at 1.)

Procedural due process, due course of law, and Texans' rights to open courts strongly favor this Court impaneling a jury to hear the factual issues raised by the Show Cause Order. U.S. Const. V and XIV, § 1, and Tex. Const. art. I, § 8, 13, and 19. The fact that review of this Court's decision in connection with the Show Cause Order is limited to appeal to the United States Supreme Court supports further the conclusion that a jury trial on these issues would be appropriate, healthy, and necessary.

2.3 Respondents' Counsel Need a Jury to Establish Whether the Conduct of Which the Court Accuses Them Constitutes an Obstruction to Justice of an Imminent Nature.

The United States Supreme Court has held that a showing of "obstruction" or "imminence" is an essential element of contempt, and not a mere factor to be considered. *In re McConnell*, 370 U.S. 230, 234 (1962) ("An

obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted." (quoting *Ex parte Hudgings*, 249 U.S. 378, 383 (1918))); *see also Holt v. Virginia*, 381 U.S. 131, 136 (1965) (addressing "vile, contemptuous, insulting language" used in allegations of bias and need to recuse, and observing, "Their convictions rest on nothing whatever except allegations made is motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part.")

Texas law, of course, holds the same. *See, e.g., Ex parte Bell*, 894 S.W.2d 119, 127 (Tex. 1995) ("The essence of 'contempt' requires conduct that obstructs or tends to obstruct the proper administration of justice." (quoting *Brown v. United States*, 356 U.S. 148 (1958))), and *In re Gibson*, 811 S.W.2d 594, 596 (Tex. Crim. App. 1991) (*per curiam*) ("The 'essence' of contempt requires conduct that obstructs or tends to obstruct the proper administration of justice.").

2.4 Respondents' Counsel Need a Jury to Establish Whether their Conduct Was Intentional or in "Reckless Disregard" of the Truth; Indeed, the Law Entitles Respondents' Counsel to an Opportunity to Prove the Truth or Falsity of Language at Issue.

Of equal importance, regarding the First Amendment issues in general, "It is recognized that persons who make derogatory statements about public officials,

including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432 (Tex. Civ. App. – San Antonio 1974 writ ref'd n.r.e.) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964)). Respondents' Counsel respectfully remind the Court that, "Any bridle upon a free flow of information to the people concerning the performance and qualifications of public officials will have little chance of gaining constitutional approval." *Semaan*, 508 S.W.2d at 432. Accordingly, an evidentiary hearing before a jury is necessary to establish truth, falsity, or reckless disregard, if any, at issue here.

WHEREFORE, PREMISES CONSIDERED, Respondents' Counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, respectfully request that this Court grant them a jury to resolve all factual issues raised by the Show Cause Order that this Court issued on November 13, 1997, in connection with Appellees' Motion for Rehearing in the above-styled and numbered matter.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

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ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States mail on this the 26th day of November, 1997.

Original Signed By
TODD W. WHITE

Todd W. White

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APPENDIX I

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,
petitioner,

VS.

ERNEST and MARILYN HAVNER,
on Behalf Their Minor Child,
KELLY HAVNER,

Respondents,

On Motion for Rehearing

ROBERT C. HILLIARD'S MOTION FOR CLARIFICATION OF ISSUES RAISED IN COURT'S SHOW CAUSE ORDER DATED 11/13/97 & MOTION FOR HEARING IN CONNECTION WITH SHOW CAUSE ORDER

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ORAL ARGUMENT REQUESTED

NO.95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

VS.

ERNEST and MARILYN HAVNER,
on Behalf of Their Minor Child,
KELLY HAVNER,

Respondents,

On Motion for Rehearing

ROBERT C. HILLIARD'S MOTION FOR CLARIFICATION OF ISSUES RAISED IN COURT'S SHOW CAUSE ORDER DATED 11/13/97 & MOTION FOR HEARING IN CONNECTION WITH SHOW CAUSE ORDER

COMES NOW Robert C. Hilliard, Counsel for Respondents, Ernest and Marilyn Havner, on behalf of their minor child, Kelly Havner, in the above styled and numbered matter, and serves and files this his Motion for Clarification of Issues Raised in Court's Show Cause Order Dated 11/13/97 & Motion for Hearing in Connection with Show Cause Order ("Motion"), and, in support thereof, respectfully shows unto the Court as follows.

1.0 Factual/Procedural Background.

On July 24, Respondents' counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton (sometimes collectively "Respondents' Counsel"), filed the Motion for Rehearing at issue here. On November 13, 1997, the Court issued a "show cause" order (the "Show Cause Order"), affording Respondents' Counsel an opportunity to "respond as to why the Court should not 1) refer each of them to the appropriate disciplinary authorities; 2) prohibit attorney Nace from practicing in Texas courts; and 3) impose monetary penalties as sanctions." (Show Cause Order at 4.) The Court identified the "tenor" of the brief (Show Cause Order at 1) and 10 of the 20 pages of text (*id.* at 3) as being of particular concern. The Court sought a response by November 17, 1997.

On November 14, 1997, Mr. Hilliard ("Movant") wrote the Court in letter form, as he was in trial at the time and under severe time constraints, and requested both a hearing and an extension of time. Thereafter, Movant's secretary received a telephone call from an employee of the Court, informing that Movant needed to file a formal motion as to each issue and pay a separate filing fee for each. Prior to Movant complying, however, Deputy Clerk, Elizabeth Saunders, informed Movant's secretary – in a separate telephone call – that the Court would accept the letter as a two-fold motion after all, provided Movant paid a filing fee of $20.00. She informed at the same time that the Court, having considered Movant's request for an extension of time to respond to the Show Cause Order, would grant his request and extend the deadline (for all of Respondents' Counsel) to

December 4, 1997. The Court denied, however, Movant's request for hearing.

2.0 Motions.

2.1 Hearing.

Movant does not file this Motion to raise issues already raised by his November 14, 1997 letter, in so far as his request for a hearing is concerned. Movant only wishes to preserve the appellate record clearly as to his having asserted his right to a hearing. By the same token, Movant does not file this Motion with the assumption that the Court will deny it. Movant only asks the Court to consider, again, the implications of its Show Cause Order.

The Court's Show Cause Order clearly state that the Court seeks to impose monetary penalties as sanctions. (Show Cause Order at 4.) The Court bases its allegations of contempt on the "tenor" of the Motion for Rehearing and language of "particular concern." In other words, the Court has asked the Movant, as well as all of the Respondents' Counsel, to explain why the conduct at issue does not constitute "criminal contempt." ***See Ex parte Chambers***, 898 S.W. 2d 257, 259 (Tex. 1995) ("Contempt of court is broadly defined as disobedience to or disrespect of a court by acting in opposition to its authority"), (and cases cited therein); ***see also Ex parte Werblud***, 536 S.W.2d 542, 545-46 (Tex. 1976) (defining and distinguishing, among other things, the concepts of "civil" and "criminal" contempt).

Because "criminal contempt" is at issue, and because the Court is considering levying monetary penalties as a form of sanctions, Movant asks the Court to reconsider

the matter of whether to grant a hearing. Movant further requests that the Court grant a hearing at which Movant may tender evidence in his self-defense and why contempt is not appropriate on the facts here.

2.2 Clarification.

The Show Cause Order raises substantial issues under the United States Constitution and the Texas Constitution. *See* U.S. Const. amend I ("freedom of speech" and right "to petition the Government for a redress of grievances") and Tex. Const. art. I, sec. 8, 13, and 19 ("freedom of speech," "open courts," and "due course of law"). The Show Cause Order will impact, in particular, the First Amendment and Texas Constitutional rights of Messrs. Hilliard and Nace and Ms. Hamilton and, more importantly, the Havner family, in real and substantial ways.

The Show Cause Order states that the Court is concerned with the "tenor" of the Motion for Rehearing. (Show Cause Order at 1.) The Court identified 10 out of 20 textual pages of the Motion for Rehearing as "rais[ing] particular concerns." (Id. at 3.) Clearly, then, the Court finds particular language appearing in the Motion for Rehearing as problematic; yet, the Court has not delineated the precise language at issue. Nor does the Court identify any disruptive or boisterous conduct by Respondents' Counsel, nor any impediment to the administration of justice.

Given these facts, the Court's Show Cause Order does not provide the notice required by the Texas Civil Practice & Remedies Code secs. 10.002(b) and 10.003. It

also lacks the specificity required by due process and due course of law principles. *See* U.S. Const. amend. V and XIV, sec. 1, and Tex. Const. art. I, secs. 8, 13, and 19.

When a court sanctions and/or refers attorneys to the grievance committee because it finds words or pieces of paper to be of an objectionable "tenor" – and not because of distracting or divisive conduct in a court room – procedural due process and due course of law principles demand that such a court identify with specificity the language for which it seeks to condemn the attorney. This conclusion is particularly true when, as here, the only avenue of appellate review is to the United States Supreme Court.

The chilling effect on the exercise of First Amendment rights is of particular concern, here, where Mr. Nace wrote no part of the Motion for Rehearing and Ms. Hamilton wrote portions of only pages, 8, 14, and 16. Likewise, for attorneys across the state trying to gauge the level of passion and vehemence appropriate for appellate practice, the Court must define with specificity what it finds contemptuous or clients, such as Respondents, will suffer from attorneys whose duty to represent zealously is undercut by fear of punitive measure by higher courts.

Procedural due process, due course of law, and Texans' rights to open courts strongly favor this Court clarifying its Show Cause Order and granting Respondents' Counsel additional time to respond to any clarifications so issued. U.S. Const. amend. V and XIV, sec. 1, and Tex. Const. art. I, sec. 8, 13, and 19.

WHEREFORE, PREMISES CONSIDERED, Robert C. Hilliard, counsel for Respondents, Ernest and Marilyn

Havner, on behalf on their minor child, Kelly Havner, respectfully requests that this Court clarify its Order dated November 13, 1997 and conduct a hearing on the issues raised thereunder, and grant such other and further relief to which Respondents' Counsel may show themselves justly entitled.

Respectfully submitted,

Robert C. Hilliard
State Bar No. 09677700
HILLIARD & MONOZ
719 South Shoreline Boulevard
Suite 600

By: /s/ Robert C. Hilliard

ATTORNEY FOR
RESPONDENTS,
ERNEST AND
MARILYN HAVNER,
On Behalf of Their
Minor Child,
KELLY HAVNER

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this document, by regular mail, on all of Respondents' Counsel, as identified below on this the 1st day of December, 1997. I have not served Petitioners' counsel as they have not sought the relief identified as under consideration by

the terms of the Court's Show Cause Order dated November 13, 1997.

/s/ Robert C. Hilliard
Robert C. Hilliard

cc w/enclosures

VIA UNITED STATES MAIL

PAULSON, NACE, NORWIND
& SELLINGER
Barry J. Nace
1814 North Street, N.W.
Washington, D.C. 20036

THE ALLISON LAW FIRM
Guy H. Allison
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Todd W. White
Rebecca E. Hamilton
118 East Rusk Street
Rockwall, Texas 75087

APPENDIX J

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

VS.

ERNEST and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

Respondents.

On Motion for Rehearing

AFFIDAVIT OF ROBERT C. HILLIARD IN RESPONSE TO COURT'S SHOW CAUSE ORDER DATED 11/13/97

COUNTY OF NUECES)
)
STATE OF TEXAS)

On this the 4th day of December, 1997, Robert C. Hilliard appeared personally before me, the undersigned authority, and, upon being duly sworn by me, Mr. Hilliard attested, deposed, and swore as follows:

"1. My name is Robert C. Hilliard. I have been a lawyer since 1983, and during those near fifteen years have stayed out of any real trouble, mostly. I wrote the original motion for Rehearing to the 13th Court of Appeals which

this Court refers to in its recent Order. Before I wrote it I worried over it and over Kelly Havner, and over myself. For a long while. I sat at my desk remembering what I had heard during the five weeks of testimony, what I had seen in the eyes of the jury when they returned their verdict, what I had listened to from Merrell Dow's lawyer during oral argument at the appellate level and what I felt to be the truth of the outcome of Kelly's case. I knew as I sat there worrying, staring out at the bay that bright morning, I had a choice to make. Either stop trying cases with every ounce of feeling, talent, and love I could manage to muster or stand up for Kelly, for myself and for my sense of justice. I made my decision based on a true need to give my client what she deserved; a person who happened to be a lawyer that cared deeply and completely about her and her parents.

2. When this Court handed down its opinion, I knew as I read it that it was an epitaph for Texas Justice. To ignore how the rights of one little Texas girl and the decision of 12 honest Texans were also sacrificed would have been to pretend – and there is no passion in pretending. I wrote the Motion for Rehearing that this Court now complains of. I wrote it because I am Kelly Havner's lawyer. This Court believes it carries the wrong tune, perhaps it feels it is too measured and far away from the indentured rhythm of acquiescence which, if this Court is successful in its sanction, would be the new Order for those of us who watch this Court machete through law and precedent like so much dead bamboo. Too many results reached by this Court over the past few years have caused many around the country who are objective and fair minded to reluctantly conclude that this particular

body of Justices means to please only whose favor is catered. Yet, even the favored are finding it harder to hide their smirks and are beginning to feel an uneasy skittishness at the Court's blatancy, handshake or no handshake.

3. My need as a lawyer and a person was not to prod the response which has now occurred but to have an opportunity to explain in strong language and on behalf of my client why a respectful review of this Court's reasoning weighed against the record and existing case law leads to the conclusion that this opinion is a legal lie. Flat out.

4. Though the initial tenor of my Motion would succeed in getting the attention of the most stubborn mule should it have been a two-by-four rather than a pleading, the language gives way to strong and well-reasoned argument, fairly explaining why this Court, as a body, should reexamine its decision. If each one of you would take a copy of my motion to a quiet place, by yourself and spend and hour or two reading the substantive body of its contents, with a mind open not to shoving back but rather to the sweet taste of justice, clear as the creeks we all swam in when we were small and pure as the hope Kelly carries from her childhood, then your decision and your written opinion would carry honor and show Courage.

5. With much deference I feel allegiance to the Texas Supreme Court, as an institution, and to our legal profession; even though we all share some blame in allowing both to drift away from what justice was suppose to mean and what we pray it still means when we explain it to our own children. I spoke out on behalf of Kelly in a way that causes you to want to punish me. I did so not out of lack

of consideration, rather out of a zealous need to protect and guard both a little girl and the institution that is the Texas Supreme Court from its own members, members who are not necessarily right, not necessarily insightful, nor necessarily mean-spirited. I did so out of a faith in what is good. Little question this Court believes I did not have the right to protect justice for my client in this manner, nor does it believe I have a duty to my client to question who is guarding the guards. This Court is wrong.

6. Kelly inspires me and I am a lawyer. Yet, despite my best efforts and strongest beliefs, in the end I could not protect her from this Court. This Court has had their way with Kelly, dispensed its "new justice", and she has gone home. Now, this Court and I face each other. Still, I must stand on the edge of what matters and know this is my place, next to Kelly, or whomever asks me for help. My place will never be otherwise. Know from the attached letter that one very wise young woman has suffered unjustly as a direct and exact result of each of you. She has also come to her own conclusions as to what this was really about. So maybe all is not lost."

FURTHER, AFFIANT SAYETH NAUGHT.

/s/ Robert C. Hilliard
Robert C. Hilliard

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public on this the 4th day of December, 1997, to certify which witness by hand and seal.

(Seal) SUSAN F. TAYLOR
Notary Public
STATE OF TEXAS
My Comm. Exp. June 8, 2000

/s/ Susan Taylor
Notary Public,
Nueces County, Texas

APPENDIX K

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD, KELLY HAVNER,
RESPONDENTS.

On Motion for Rehearing

AFFIDAVIT OF REBECCA E. HAMILTON IN RESPONSE TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997

STATE OF TEXAS §
§
COUNTY OF ROCKWALL §

On this, the 4th day of December, 1997, Rebecca E. Hamilton appeared personally before me, the undersigned authority, and, upon being cautioned and sworn by me, Ms. Hamilton attested, deposed and swore as follows:

1. "I am Rebecca E. Hamilton. I am over the age of 18, have never been accused, charged, or convicted of any crime, misdemeanor (other than traffic, for which I have

taken defensive driving) or felony. I have never been sued nor have I ever been brought before the Grievance Committee of the State Bar of Texas on any complaint by anyone. None of my clients ever have so much as sent me a letter complaining about my services. I have no mental disabilities. I am fully competent to execute this Affidavit and have personal knowledge of the facts I aver herein.

2. I attended undergraduate school at Cornell University, College of Arts and Sciences, where I graduated with a B.A. in Archaeology in 1982. Thereafter, I worked for a legal aid organization, the Legal Resources Trust, in Cape Town, in the Republic of South Africa, as well as the Socio-Legal Studies Department of the University of Cape Town, through 1984.

3. I graduated with honors from the University of Texas, with a J.D. in 1987. During the years I was at U.T., I took a semester off and completed my work in Cape Town. These efforts resulted in two published articles on apartheid, one focusing on its effects on child custody allocation upon divorce among native African peoples and the other focusing on property laws of the Republic and how they shaped apartheid. The former article was published in a book consisting of articles on apartheid and its effects on the family. The American legal journal. *The National Black Law Journal*, published the latter.

4. In 1987, I gave birth to my daughter, Rachel G. S. King, one and a half months before I took and passed the Bar Exam. Thus, in November 1987, this Court admitted me to practice in the State of Texas. I currently am admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Fifth and

Eighth Circuits, and the United States District Court for the Southern and Northern Districts of Texas.

5. Upon graduation, in 1987, I clerked for Justice Sam Bass, who sat at that time on the First Court of Appeals in Houston.

6. In 1988 I worked in Dallas for the law firm of Gibson, Dunn & Crutcher. In 1989, I accepted employment with the law firm of Jones, Day, Reavis & Pogue. While at Jones, Day, I wrote two articles, which the *Appellate Advocate*, the newsletter for the Appellate Section of the State Bar, published. I also joined the Continuing Legal Education and the Pro Bono Colleges of the State Bar of Texas. During this time period I resigned from the ABA, because I disagreed with its political statements supporting abortion. I have not rejoined the ABA.

7. In 1993, this Court appointed me to the Board of Directors of the Texas Equal Access to Justice Foundation. It is my understanding that the appointment was unanimous. Further, this Court reappointed me in 1996. It is my understanding that this decision, too, was unanimous.

8. While serving on the Board, I have edited, at the request of State Bar President Dean Frank Newton, the papers filed on behalf of the Court – as well as the Foundation – in the *Washington Legal Foundation* litigation, which matter currently pends before the United States Supreme Court on certiorari. My efforts have been entirely *pro bono*.

9. In 1993, I began work with John R. W. Cracken, a plaintiffs' attorney in Dallas, Texas. One year later, I

began work with Allison & Huerta, a plaintiffs' firm in Corpus Christi. Although Allison & Huerta since has dissolved, I continue to handle most of the partners' appellate work.

10. I currently have five matters pending before the Court:

> *Hyundia Motor Co. v. Alvarado,* Cause No. 95-0969;
>
> *Clawson v. Wharton County,* Cause No. 97-0190;
>
> *Chambers v. Wharton County;* Cause No. 97-0191;
>
> *Merrell Dow Pharmaceuticals, Inc. v. Havner;* Cause No. 95-1036; and
>
> *Martinez v. Uniroyal Goodrich Tire Co.,* Cause No. 95-1159.

I believe that my work in each of those cases reflects my respect for this Court and the judicial process. I encourage the Court to review my work in each of those cases.

11. I am a Republican. I have served as General Counsel for the Texas Young Republicans and as Assistant General Counsel for the National Young Republicans. I have supported every current member of this Court – Republican or otherwise.

12. I belong to no plaintiff or defense bar associations. Throughout my career as an attorney, I have represented defendants and plaintiffs on a roughly equal basis. I have defended – successfully – both doctors and insurance companies in large, bad faith suits.

13. I am a member of the University of Texas Chancellors' Council, having founded (along with my little

brother) a scholarship in honor of our father, Terrell H. Hamilton, who served as a fully tenured professor of Zoology at the University for nearly 25 years. In fact, every other member of my immediate family is a Harvard-educated scientist – my father was a biochemist; my mother is an engineering scientist (now retired) with a background in the history of science and scientific thought; and my brother is a particle physicist at Stanford University.

14. I described to my mother and brother the *Havner* case – in particular the plaintiffs' scientific evidence (my father being deceased by that time) – when Robert C. Hilliard first contacted me. They both agreed that the scientists' techniques were valid and the conclusions that the plaintiffs' experts had drawn were reasonable and sound.

15. Robert C. Hilliard had retained Allison & Huerta – after this controversial, first motion for rehearing, to argue the *Havner* case on *en banc* rehearing before the Corpus Christi Court of Appeals. Although Mr. Guy H. Allison was to argue that motion, I agreed to provide legal briefing in light of the discussions detailed in paragraph 13.

16. I provided briefing on legal matters *after* Mr. Hilliard's initial, controversial motion papers. I had no role in preparing the controversial, earlier work. Mr. Allison argued the matter on rehearing and the Corpus Christi Court of Appeals, sitting *en banc*, reversed its original decision.

17. I have continued to serve as counsel for Kelly Havner from that time to the present except during those periods when I was physically incapacitated.

18. Upon issuance of this Court's decision, Mr. Hilliard contacted me and asked me to work with him extensively on the Motion for Rehearing at issue here.

19. I wrote all the substantive legal portions of the Motion for Rehearing. I contributed nothing to the Motion for Rehearing that I believe to be disrespectful or offensive, much less contemptuous or sanctionable. I have acted at all times with utmost respect for this Court and the judicial process.

20. I acted then and act now in good faith belief that I was and am acting in the best interest of my clients. It was never my intent, and never has been, to act in a contemptuous or sanctionable fashion and I do not believe that I have done so.

21. I edited the Motion for Rehearing in its entirety, providing cite form, punctuation, and grammatical input.

22. I advised Mr. Hilliard to remove some of the portions of the Motion for Rehearing that I assume the Court finds objectionable. As he was lead counsel, he had the prerogative to refuse and he did so.

23. When he declined to do so, I told him that I needed to consider whether I would allow my name to appear on the Motion for Rehearing in its final form. I spent a substantial amount of time, under the circumstances, considering many factors that I felt bore on the issue of whether to allow my name to appear on the Motion for Rehearing. They were:

(a) I believed that the legal briefing section of the Motion for Rehearing was correct and strong. I was and am still proud of it;

(b) I believed that, to the extent any member of this Court remembers who I am, they would consider my work with credence and respect, which would benefit my clients;

(c) I believed that perhaps any residual goodwill and respect towards me would undercut any anger and resentment towards Messrs. Hilliard and Nace and, again, benefit my clients;

(d) I believed that, should I decline to allow my name to be used, it would undercut the strength of my clients' position and, as a member of the Bar, I owed my first duty to my clients; and

(e) I believed that the history of the case merited some expression of passion and shock – that is, after all, the nature of a rehearing motion as a general proposition – and that Mr. Hilliard and Kelly had a First Amendment right to express those feelings.

24. Based on the factors described in paragraph 23, and based on further discussion with scientists outside of the case (*i.e.*, my mother and brother), I believed in good faith that my clients' interests were best served by my allowing my name to appear on the cover of the Motion for Rehearing and signature block.

25. I did not sign the Motion for Rehearing.

26. It is my understanding that Mr. Barry J. Nace had either no input or virtually no input as to the Motion for Rehearing at issue."

FURTHER, AFFIANT SAYETH NAUGHT.

/s/ Rebecca E. Hamilton
Rebecca E. Hamilton

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public, on this the 4th day of December, 1997, to certify which witness by hand and seal.

(Seal) NANCY SEMPLE
MY COMMISSION
EXPIRES June 30, 2001

/s/ Nancy Semple
Notary Public
in and for the
State of Texas
